A HISTORY

OF

THE CRIMINAL LAW OF ENGLAND.

VOL. III.

A HISTORY

OF

THE CRIMINAL LAW OF ENGLAND.

BY

SIR JAMES FITZJAMES STEPHEN, K.C.S.I., D.C.L.,

A JUDGE OF THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION.

IN THREE VOLUMES.

VOL. III.

London:

MACMILLAN AND CO.

1883.

LONDON:
R. CLAY, SONS, AND TAYLOR,
BREAD STREET HILL.

CONTENTS.

CHAPTER XXXII.

CHAPTER XXXIII.

CHAPTER XXXIV.

A HISTORY

OF

THE CRIMINAL LAW OF ENGLAND.

CRIMINAL LAW.

CHAPTER XXVI.

HISTORY OF THE LAW RELATING TO MURDER AND MANSLAUGHTER.

HAVING in the preceding chapters given the history of offences against the tranquillity of the state, I pass to the history of offences against individuals. Most of these are punishable under the various provisions of the five consolidation acts of 1861, namely, 24 & 25 Vic. cc. 96, 97, 98, 99, and 100. These statutes define most of the crimes which they punish, and I shall have to notice both the history of the acts themselves, and the history of some of their detailed provisions; but they do not define, but assume the definitions of the most important of those crimes; particularly homicide and theft. CH. XXVI.

Each of these definitions has a history of its own, of considerable interest, quite distinct from the history of the act by the provisions of which the crime defined is punished. In the present chapter I propose to deal with the history of the definition of the offence of homicide in its two forms of murder and manslaughter. In the next chapter I shall examine, so far as I think it necessary to do so, the other provisions of the act relating to offences against the person.

The manner in which and the occasions upon which people

CH. XXVI. may be killed, and the circumstances by which the moral character of the act of killing is determined vary little, in the times and countries with which I am concerned, and I will try to make a statement of them. The vast mass of cases which have at different times been decided about homicide have supplied the materials for this statement; but as my present object is to make the subject intelligible without dwelling on technicalities, I will not at present refer to them specifically.

The subject obviously divides itself as follows:—

1. What is homicide?

2. In what cases is homicide lawful, and in what cases is it unlawful?

3. What is the nature of the distinction between the two forms of unlawful homicide, murder and manslaughter?

It is only by this preliminary analysis of the result that the process by which it was reached can be understood.

First, then, What is homicide?

Homicide obviously means the killing of a human being by a human being; but each member of this definition suggests a further question. When does a human being begin to be regarded as such for the purposes of the definition? What kind of act amounts to a killing?

With regard to the first question the line must obviously be drawn either at the point at which the fœtus begins to live, or at the point at which it begins to have a life independent of its mother's life, or at the point when it has completely proceeded into the world from its mother's body. It is almost equally obvious that for the purposes of defining homicide the last of these three periods is the one which it is most convenient to choose. The practical importance of the distinction is that it draws the line between the offence of procuring abortion and the offences of murder or manslaughter, as the case may be. The conduct, the intentions, and the motives which usually lead to the one offence are so different from those which lead to the other, the effects of the two crimes are also so dissimilar, that it is well to draw a line which makes it practically impossible to confound them. The line has in fact been drawn at this point by the law of

England; but one defect has resulted which certainly ought to be remedied. The specific offence of killing a child in the act of birth is not provided for, as it ought to be. It was proposed by the Criminal Code Commissioners to remove this defect[1] by making such an act a specific offence punishable with extreme severity, as it borders on murder, though the two should not be confounded.

The question what amounts to killing is of greater difficulty and intricacy and it will, I think, be found to divide itself into several subordinate questions, all having reference to the extension to be given to an expression which in its obvious primary sense presents no difficulty. Where one man with his own hand stabs, strikes, or strangles another, and so causes his death, he obviously kills him, but the exact limits of the phrase are by no means obvious. The practical questions which arise are these. Killing may be defined as causing death directly, distinctly, and not too remotely; but several questions occur as to the limitations imposed upon the word "causing" by these qualifications. The following classification of the subject is, I think, sufficient for practical purposes.

A man may be killed either by an act or by an omission. Killing by an act is the common case and shall be considered first.

In order that a man may be killed by an act the connection between the act and the death must be direct and distinct, and though not necessarily immediate it must not be too remote. These conditions are not fulfilled (1) if the nature of the connection between the act and the death is in itself obscure, or (2) if it is obscured by the action of concurrent causes, or (3) if the connection is broken by the intervention of subsequent causes, or (4) if the interval of time between the death and the act which causes it is too long. Whether in particular cases these conditions are or are not fulfilled is always a question of degree dependent upon circumstances. The principle may be illustrated in a variety of ways, but no precise and completely definite statement of it can be made.

[1] See section 212 of Draft Code.

CH. XXVI.

Killing by an act which causes death in a common well recognised way either immediately or after an interval of time insufficient to disguise or complicate the connection between the cause and the effect is the typical and normal case, and this is well illustrated by the old form of indictments already described. "A. in and upon B. did make an assault, and with "a knife which he the said A. held in his right hand did give "to B. on the left breast one wound of the length of one inch "and of the depth of four inches, of which the said B. for four "days did languish, and languishing did live, and of which on "the fifth day the said B. died." The extreme particularity of such indictments shows a consciousness on the part of the early lawyers of the narrow limits of their own knowledge, and of the importance which they attached both to alleging and to proving that the unlawful act done was in fact the immediate distinct cause of the death of the deceased.

The possibility of framing an indictment for given conduct was, so long as the ancient strictness of pleading was observed, the true test of criminality, just as the question whether a given act would fall within any one of the known forms of action was regarded as the test of its being a contract or a tort.

This is illustrated by the case of witchcraft. It was for many centuries believed that people could be killed by witchcraft, but such supposed acts were never prosecuted as murder because the mode in which witchcraft operated was unknown, and so could not be stated in an indictment.

Belief in homicidal [1] witchcraft being exploded, the difficulty which it might once have caused can no longer arise, but cases may still occur in which death is caused by an act inflicting no definite assignable bodily injury upon the person killed, or in which death, if followed by such an injury, may or may not be regarded as the effect of it. Thus, for instance, it is often said, and sometimes truly, that a son breaks his mother's heart by dissolute and extravagant habits, or that a woman dies because she has been seduced and deserted.

[1] I say "Belief in homicidal witchcraft," because the belief in spirit-rapping is the modern representative of belief in witchcraft, and is as common and as earnest as its predecessor. It seems to me to be just about as well founded, and to be based upon the same fundamental absurdities.

In cases of this kind it would generally be impossible to prove any definite connection between any one act on the part of the person said to cause the death, and the actual occurrence of the death. Whether mere grief and anxiety ever killed a thoroughly healthy person, and if so, what were the special symptoms which brought the death about, is, I suppose, doubtful. I know of no instance in which the question whether such conduct is homicide has ever been raised.

Another set of cases in which it might be doubtful whether homicide had been committed or not are those in which an obscure mortal injury is definitely caused by an apparently inadequate cause—a cause at least which does not usually produce such results. A very slight nervous shock might in many cases kill a person suffering under disease of the heart as effectually as a shot or a stab. I suppose there are cases in which acts which in health would pass unnoticed, such as the disarrangement of a pillow, sudden waking from deep sleep, or the sudden communication of bad news, might cause the death of a sick person, just as a man hanging over a precipice might be killed by loosening a stone or a root. In all such cases the connection between cause and effect is not only definite, but when the facts are known it is obvious; but they are all cases in which death is caused without the infliction of any such obvious definite bodily injury as seems to have been required by the old law in order to make an act homicide. To shout in the ear of a sleeping man who has certain diseases of the heart may be as effectual a way of killing him as a stab with a knife, but at first sight such a death would not be described as being caused by any definite bodily injury. Should such a case occur in the present day I think it would be regarded as killing.

There are few, if any, decisions and not many dicta on this subject in the books. The only one of much importance with which I am acquainted occurs in [1] Hale's *Pleas of the Crown*. "If any man either by working on the fancy of "another, or possibly by harsh or unkind usage, puts another "into such passion of grief or fear that the party either dies

[1] i. 429.

CH. XXVI.

"suddenly or contracts some disease whereof he dies, though "as the circumstances of the case may be, this may be "murder or manslaughter in the sight of [1] God, yet *in foro* "*humano* it cannot come under the judgment of felony, "because no external act of violence was offered, and secret "things belong to God, and hence it was that before the "statute of 1 James 1, c. 12 witchcraft or fascination was not "felony, because it wanted a trial" (I suppose this means because it could not be proved), "though some constitutions "of the civil law make it penal."

The great improvements which have taken place in medical knowledge since Hale's time of course make it possible in the present day to speak much more decisively on the question whether death has been caused by a given act or set of acts than was formerly possible. It might be impossible to say precisely whether a woman's death was caused by the unkindness of her husband, but where death was caused by a definite nervous shock or the like, I suppose there would be no difficulty in ascertaining the fact.

With regard to concurrent causes of death questions of the utmost difficulty often arise, especially upon trials for manslaughter; but the difficulty lies entirely in ascertaining the facts, and not in applying the law to them. Every effect is caused by every event of which it may be affirmed that if it had not happened the effect would not have been produced. Leaving out of consideration the remote and accidental causes of death, it often happens that several events are so connected with a given death that it is difficult to say which of them caused it.

For instance, a man in weak health is violently assaulted, and dies after some weeks or months. Upon a *post-mortem* examination it appears that he suffered under a mortal disease which no doubt was one cause of his death. The question, however, arises whether but for the violence he received he would have died when he did? The law is perfectly clear, that if by reason of the assault he died in

[1] There is something rather grotesque in the notion of God's recognizing the distinction between murder and manslaughter, as will appear when the history of the definition is given.

the spring of a disease which must have killed him, say in the summer, the assault was a cause of his death; but the difficulty of deciding the fact is often very great. I lately tried a case in which a man was accused of having caused his wife's death by a blow on the head. There was evidence that he struck her, there was also evidence that after he struck her she had jaundice and inflammation of the brain, and a premature confinement attended with some unfavourable circumstances (which, however, would tend to relieve the inflammation of the brain), after which she died. Whether the blow was the cause of this train of symptoms, or whether it was merely an accidental antecedent of them was a question of considerable intricacy and difficulty, though certain details as to the character of the inflammation of the brain showing its origin led to the prisoner's conviction.

The following are instances of concurrent causes of death. A man receives an injury for which he undergoes a surgical operation, of the results of which he dies. He refuses to undergo a surgical operation which would probably have cured him, and in consequence of his refusal he dies. The surgeon who attends him is incompetent and pursues a wrong course of treatment, either from ignorance or from bad faith, and this ends in his death. The surgeon's treatment is proper, but the patient will not observe his directions and dies. In all these cases the deceased is regarded as having been killed by the injury except in the case of the malpractice of the surgeon; but it is also worth while to observe that in all of these the connection between the act and the death caused by it is direct and distinct, though it cannot in any of them be called immediate. In each of them the man would not have died as he did if he had not been wounded; but also in each case something different from his wound caused his death, and was a more immediate cause of it than the wound.

I pass next to the cases in which, though the connection between the death and the injury is direct and distinct, other causes have intervened sufficiently distinct from and independent of the injury to prevent the case from being treated as homicide. It is needless to refer to cases where the cause

CH. XXVI. is obviously remote. No one would say, for instance, with reference to this subject, that a man's parents had caused his death by causing his birth. The only cases worth examining are those which illustrate the limit. One obvious limit is length of time. Instances of death from wounds or other injuries received many years before death are [1] not unknown. In some cases of this sort the connection is clear. In general it would be obscure. The law of England has laid down an arbitrary rule for criminal purposes upon this subject. No one is criminally responsible for a death which occurs upwards of a year and a day (that is, more than a complete year reckoning the whole of the last day of the year) after the act by which it was caused.

A more remarkable set of cases are those in which death is caused by some act which does unquestionably cause it, but does so through the intervention of the independent voluntary act of some other person. Suppose, for instance, A. tells B. of facts which operate as a motive to B. for the murder of C. It would be an abuse of language to say that A. had killed C., though no doubt he has been the remote cause of C.'s death. If A. were to counsel, procure, or command B. to kill C. he would be an accessory before the fact to the murder, but I think that if he had stopped short of this A. would be in no way responsible for C.'s death, even if he expected and hoped that the effect of what he said would be to cause B. to commit murder. In Othello's case, for instance, I am inclined to think that Iago could not have been convicted as an accessory before the fact to Desdemona's murder, but for one single remark—"Do it not with poison, "strangle her in her bed." [2]

[3] This principle would apply to the case, often discussed but never expressly decided, of murder by false testimony.

[1] It is stated, *e.g.* that Andrew Jackson received a wound in a duel which displaced some of his internal organs, and rendered him liable to occasional severe fits of sickness, one of which, many years after the duel, caused his death. Sir William Napier received a ball in his back in the Peninsular War which caused him frightful torture for the rest of his life, and might, I suppose, have caused his death.

[2] As, however, Othello killed himself, Iago, in the then state of the law, could not even have been brought to trial in England.

[3] See the case of R. *v.* McDaniel, 19 *St. Tr.* 810, note, in which this view was acted upon, though no express judicial opinion was given upon it.

Oates directly and distinctly caused the death of several innocent persons by perjury, but the fact that the judges and juries who tried the cases acted upon their own responsibility, and because they chose to believe Oates's testimony, so disconnected his perjury from the death which he caused that even in 1685 it was not thought possible to convict him of murder. An instance of a somewhat similar kind is this. A woman dies in her confinement. It can hardly be said that the father of her child has killed her, though the connection between his act and her death is perfectly distinct. Even if the connection which caused the birth of the child was a rape, I do not think that the death would amount to murder; nor would it be so if a husband, tired of his wife, and being warned that her death would be the probable result of childbirth, intending and hoping to cause her death, actually caused it in the manner supposed. Death by childbirth and the connection which leads to childbirth are separated from each other by so many possibilities, and the circumstances which render childbirth dangerous or otherwise have so little relation to its distant cause, that I think if the question were ever raised it would be considered that the cause of death was too remote for the act to be regarded as homicide. Somewhat similar illustrations might be supplied by the case of infection. A. hoping that B., his enemy, will catch the small-pox, induces him to walk down a street in which many persons are sick of it. B. catches the small-pox and dies. A. no doubt has caused B.'s death, but in a manner so remote and dependent on so many contingencies that it could hardly be said that he had killed him. Should such a case occur however, and should the facts be plainly proved, it is difficult to say how the court might ultimately decide.

Thus far I have illustrated the proposition that in the case of killing by an act the act must be connected with the death, directly, distinctly, and immediately. I now come to the case of killing by omissions.

The idea of killing by an omission implies, in the first place, the presence of an opportunity of doing the act the omission of which causes death. It would be extravagant to say that a man who having food in London omits to give

CH. XXVI. it to a person starving to death in China has killed the man in China by omitting to feed him; but it would be natural to say that a nurse who being supplied with food for a sick person under her care omits to give it, and thereby causes the sick person's death, has killed that person. Whether a person, who being able to save the life of another without inconvenience or risk refuses to do so, even in order that he may die, can be said to have killed him is a question of words, and also a question of degree. A man who caused another to be drowned by refusing to hold out his hand to save him probably would in common language be said to have killed him, and many similar cases might be put, but the limit of responsibility is soon reached. It would hardly be said that a rich man who allowed a poor man to die rather than give, say £5, which the rich man would not miss, in order to save his life, had killed him, and though it might be cowardly not to run some degree of risk for the purpose of saving the life of another, the omission to do it could hardly be described as homicide. A number of people who stand round a shallow pond in which a child is drowning, and let it drown without taking the trouble to ascertain the depth of the pond, are no doubt, shameful cowards, but they can hardly be said to have killed the child.

Whether the word "killing" is applied or not to homicides by omission is to a great extent a question of words. For legal purposes a perfectly distinct line on the subject is drawn. By the law of this country killing by omission is in no case criminal, unless the thing omitted is one which it is a legal duty to do. Hence, in order to ascertain what kinds of killing by omission are criminal, it is necessary, in the first place, to ascertain the duties which tend to the preservation of life. They are as follows:—A duty in certain cases to provide the necessaries of life; a duty to do dangerous acts in a careful manner, and to employ reasonable knowledge, skill, care, and caution therein; a duty to take proper precautions in dealing with dangerous things; and a duty to do any act undertaken to be done, by contract or otherwise, the omission of which would be dangerous to life. Illustrations of these duties are the duty of parents or guardians, and in

some cases the duty of masters, to provide food, warmth, clothing, &c., for children; the duty of a surgeon to employ reasonable skill and care in performing an operation; the duty of the driver of a carriage to drive carefully; the duty of a person employed in a mine to keep the doors regulating the ventilation open or shut at proper times. To cause death by the omission of any such duty is homicide, but there is a distinction of a somewhat indefinite kind as to the case in which it is and is not unlawful in the sense of being criminal. In order that homicide by omission may be criminal, the omission must amount to what is sometimes called gross, and sometimes culpable negligence. There must be more, but no one can say how much more, carelessness than is required in order to create a civil liability. For instance, many railway accidents are caused by a momentary forgetfulness or want of presence of mind, which are sufficient to involve the railway in civil liability, but are not sufficient to make the railway servant guilty of manslaughter if death is caused. No rule exists in such cases. It is a matter of degree determined by the view the jury happen to take in each particular case.

These considerations give a sufficiently distinct notion of what is meant by homicide according to English law. The next important question relating to it is as to the distinction between lawful and unlawful homicide.

As one of the great objects of all law, and particularly of criminal law, is the protection of life, it follows that homicide must, as a rule, be unlawful, so that it is necessary to consider only those cases in which it is lawful. A further division may be made between justifiable homicide and excusable homicide. This distinction has some historical interest, though at present it involves no legal consequences.

Homicide may be regarded as the highest form of bodily injury which can, in the nature of things, be inflicted. It is no doubt possible to suggest cases of mutilation and humiliation which would convert life into a lingering course of agony and shame, and would so be far more terrible than death, but such cases are rare, and need not be specifically considered. The cases, therefore, in which homicide is lawful may be considered in connection with those in which bodily injuries in

CH. XXVI. general are lawful. There are cases in which the infliction of minor injuries is lawful, though the infliction of death is unlawful, but I know of no case (except the single case of capital punishment) in which an occasion which would justify the infliction of death would not justify the infliction of minor injuries.

The following, then, are the principal cases which justify or excuse the infliction of death, or minor personal injuries:—

1. The execution of legal punishment and legal process.
2. Keeping the peace.
3. The prevention of crime.
4. Private defence.
5. Consent.
6. Accident.

To this might be added injuries inflicted during war, but these I do not propose to consider, having already to some extent referred to them.

The infliction of legal punishments, and the execution of legal process belong to the subject of criminal procedure, and have already been considered. If the subject is followed out in all its details, it is intricate, and requires elaborate treatment; but the general principle upon which it depends is simplicity itself. The execution of legal process and the infliction of legal punishments are the very reasons for which the criminal law exists, and it would involve a fundamental contradiction if they were not themselves lawful actions.

This general principle is qualified by two subordinate principles equally plain. The first is that no greater amount of force can be lawfully employed in any case than that amount which the person who employs it regards upon reasonable grounds, and in good faith, as necessary for the attainment of his object. The other is that where a man acts in the discharge of what, under a mistake of fact, he supposes, on reasonable grounds, to be a legal duty, or in what he supposes, on reasonable grounds, to be the defence of his person or his house against serious instant danger (as, for instance, if a man resisted people pretending by way of joke to rob him), his position is, generally speaking, the same as it would have been

if the facts which he supposed to exist had really existed. If, however, under a mistake of fact he uses violence, which, if the supposed facts had existed, he would have been under no legal obligation to use, and which he did not believe to be necessary for the immediate protection of his life or habitation, he acts at his peril, and if he is mistaken is not justified. For instance, a man shoots a person whom he supposes upon reasonable grounds to be a burglar breaking into his house, though in fact he is not. He is justified. Another man shoots a person whom he believes on reasonable grounds to be a felon whom he cannot otherwise arrest. He is not justified if he is mistaken. If he was a police officer, whose duty it is to arrest felons, he would be justified.

Simple and obvious as these principles are, a full statement of the law upon the subject would be tedious and intricate, because when the principles stated have to be applied to facts, a number of subordinate distinctions arise which it is necessary to consider.

Without going into details I will indicate the nature of these questions. The execution of a lawful sentence, process, or warrant, is of course justifiable, but difficulties arise if the sentence, warrant, or process is illegal, or if a mistake is made as to the person affected. So in regard to arrests without warrant, there are differences between the position of peace officers, persons charged by peace officers to assist, and private persons. There are also differences between the arrest of persons found committing crimes, the arrest of persons suspected of having committed felonies, and the prevention of the escape of persons arrested, whether by peace officers or private persons. These distinctions, however, have little general interest, and I need not dwell upon them.

I now come to acts of violence necessary for the preservation of peace and the prevention of crime. The distinction between these two objects is matter rather of language than of substance, for on the one hand every breach of the peace is a crime; and on the other, no force can prevent crimes except crimes of violence. No one uses force or would be in any way justified or excused in using force to prevent a man from committing forgery or perjury. It is, however,

CH. XXVI. convenient to distinguish the two cases, because the questions arising on them differ. The force employed for the suppression of a riot or of treason by levying of war is of a different kind, and usually gives rise to questions of a wholly different nature from the employment of force against a burglar or highway robber.

As the cases of preservation of the peace and the prevention of crime are closely connected, so the prevention of crime and self-defence are also closely connected. If a highway robber attacks a peaceable person with murderous violence, the person attacked has two or even three grounds on which his conduct in resisting, even with deadly weapons, may be justified. They are, first that of self-defence; secondly, the prevention of a crime; and thirdly, the arrest of a felon. His rights in these three capacities do not in this particular case materially differ. If, instead of being attacked by a robber, he was attacked by a furious madman, the case would be one of self-defence only, but his rights would be precisely the same, except that he would not be justified in killing the madman if he tried to escape upon resistance, and could not otherwise be taken.

Where the violence to be resisted does not amount to a felony, but is an assault more or less aggravated, the person assaulted has a right to resist, the degree of the resistance being regulated by the nature of the assault. Even if the assault has been provoked by the person assaulted he may nevertheless defend himself, unless the provocation given by him was in itself an assault, and the violence provoked by that assault was no more than was necessary for the immediate self-defence of the party who employs it. But in all cases the duty of the person who begins an affray is when resisted to run away as soon and as far as he can, nor is he regarded as defending himself, in any violence which he may use, unless he is pursued, overtaken, and subjected to unnecessary violence. The older authorities, indeed, go so far as to say that it is in all cases the duty of the party assaulted to run away; but this I think ought to be restricted to cases of what amounts to a challenge to fight with deadly weapons.

The right of defending proprietary rights by force varies

to some extent according to the nature of the property defended. Generally speaking, the principle is this:—The person injured may prevent the wrongdoer by force not extending to blows or wounding, from pursuing or effecting his unlawful purpose, but may not strike or wound him, either in order to prevent his unlawful act or in order to punish him for having acted unlawfully. For instance, he may put a trespasser out of his house, or out of his field by force, but he may not strike him, still less may he shoot or stab him. If the wrongdoer resists, the person who is on the defensive may overcome his resistance, and may proportion his efforts to the violence which the wrongdoer uses. If the wrongdoer assaults the person who is defending his property, that person is in the position of a man wrongfully assaulted, and may use whatever violence may become necessary for the protection of his person. CH. XXVI.

There are some cases, as *e.g.*, the right to correct a scholar, and the right to preserve discipline in a ship of which I need say nothing here.

The principle already stated will serve in most cases to determine the cases in which homicide is justifiable. The typical instances are the execution of a criminal duly condemned to death; the killing a man who cannot otherwise be prevented from, or be arrested for, committing a felony, or who would otherwise inflict on the person who kills him death or grevious bodily harm; the killing of rioters who cannot otherwise be dispersed, and who are likely, if not dispersed, to destroy life or property, or to prevent the due course of the administration of the law. In each of these cases killing by the use of deadly weapons may be justified. Killing a man by force lawful under the circumstances, and neither likely nor intended to kill (as where a man who strikes another with his fist, and is himself killed by a blow with the fist, given in reasonable self-defence), is also justifiable.

The cases in which homicide is excusable may all be reduced under the head of accident, that is to say, killing without any intention to kill or hurt; and upon this the law of England recognises two distinctions. Death may occur

CH. XXVI. accidentally, or, which is the same thing, unintentionally, in the doing of an act in itself lawful, or in itself unlawful. It may also occur by reason of the omission to perform a legal duty tending to the preservation of life. The following are typical instances of these four classes of accidental death.

1. A. fires a gun at a mark. The gun bursts and kills B.

2. A. fires a gun at a mark without giving proper warning or taking proper care in placing the mark and kills B.

3. A. fires a gun at C. with intent to murder him, the gun bursts and kills B., A.'s accomplice.

4. A. fires a gun at C. with intent to murder him and kills B. whom A. had not warned to stand out of the way.

In each of these cases the death of B. is unintended. In the first and third cases the death of B. is what may be called a pure accident; it is not only unintended, but it arises from circumstances which a prudent man would not naturally foresee or take precautions against, and which A. cannot have thought of, for if he had, he would certainly not have fired the gun. But in the first case A. is doing an innocent, and in the third a most wicked action.

In the second and fourth cases A. omits a precaution proper under the circumstances, but in the second case the act itself is innocent; in the fourth it is so wicked that the omission to give warning to B. would hardly be regarded as an aggravation of the moral guilt of firing at C.

These differences exist in the nature of things, and I merely note them for the present without discussing the way in which they are treated by English law, further, than by saying that homicide caused accidentally by any unlawful act is unlawful. The expression, "unlawful act," includes, I believe, all crimes, all torts, and all acts contrary to public policy or morality, or injurious to the public; and particularly all acts commonly known to be dangerous to life.

The only additional remark I have to make upon the law relating to justification and excuse for the infliction of bodily injury has reference to the subject of consent. Where death is caused the consent of the party killed to his own death is regarded as wholly immaterial to the guilt of the person who causes it. If an injury less than death is caused

the consent of the party injured seems to supply a defence, unless the injury itself is illegal, or unless the circumstances under which it is inflicted make it illegal. A consent to be maimed, or a consent to be beaten in a prize fight does not prevent the offender from being guilty of an offence.

The next question is as to the distinction between the two forms of unlawful homicide, namely, murder and manslaughter. The distinction has been elaborated by an immense number of decisions extending over several centuries, of part of which I shall give the history. At present, however, I am occupied only with the analysis of the result. It is intricate, though I think it is capable of being reduced to greater precision than might at first sight be expected. This is the fault, not of the judges nor of the legislature, but of the nature of things. In homicide, as in all other crimes, the definition consists of two parts, the outward act and the state of mind which accompanies it; and there is no crime (unless it be treason or libel) in which so many different possible states of mind have to be considered. The case, moreover, is liable to one special qualification which is peculiar to this particular offence. Whatever else the definition includes it must include the fact of death; but there is no definite connection at all between the fact of death and the moral guilt or public danger of the act by which death is caused. The most deliberate, desperate and cruel attempt on life may not cause death, the most trifling assault may cause it. Death may be intentionally caused under circumstances of the greatest possible atrocity, or under circumstances which produce rather pity for the offender than horror at the offence; or, again under circumstances which indicate determined defiance of the law, but do not involve any special ill will to any particular person. This extreme variety in the circumstances under which, and the intentions with which death may be occasioned is the true cause of the great difficulty which has been found in giving satisfactory definitions of the different forms of homicide.[1]

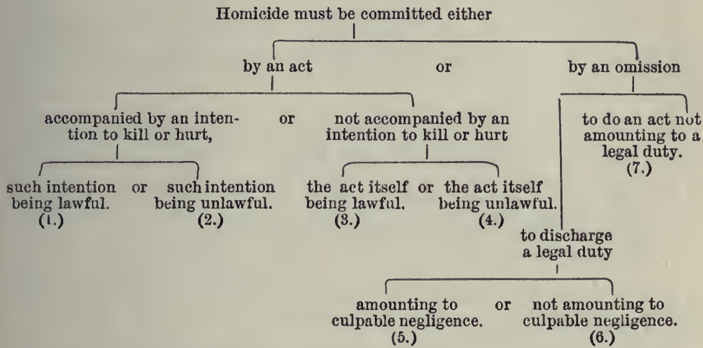
[1] I hope I may not be regarded as egotistical in saying that I have been led by circumstances to consider this matter more frequently and in greater

The following account, I think, shows that the matter is capable of being reduced to a form which can be shown to comprehend every possible mode of taking life, and to provide, for such of them as are treated as criminal, punishments bearing a proportion both to their moral guilt and to the public danger which they involve. The first step is to classify homicide as lawful and unlawful; the next to divide unlawful homicide into the two offences of murder and manslaughter. All homicide is unlawful which is neither justifiable nor excusable according to the principles already stated; but in order to classify unlawful homicide so as to enable us to proceed to divide it into degrees we must have regard to two things, namely, the nature of the act or omission by which death is caused as being in itself lawful or unlawful, and the intention by which that act or omission is accompanied. It may not unnaturally be asked whether the motive ought not to be considered as well as the intention. I think that it ought not. As matter of evidence the existence of a motive for an offence is always important. In reference to punishment the nature of the motive may in particular cases be of importance; but the motives of the offender ought never in my opinion to enter into the definition of an offence. The reason is that it is always extremely difficult to ascertain or prove them; because they are generally mixed, and nearly always fluctuating; and because they do not affect the public danger or actual mischief of the crimes which they cause.

The following table will, I think, be found to be exhaustive in this view, and to exhibit every imaginable case of

detail than any previous writer upon it. I had to consider it repeatedly whilst Legal Member of Council in India, in connection with the definition in the Indian Penal Code, which has been the least successful part of that great work (see pp. 313-314, *post*). I drew a bill in 1874, called the "Homicide "Law Amendment Bill," which was introduced by the late Mr. Russell Gurney into Parliament, and was referred to a Select Committee, which reported upon it at considerable length. A full consideration of the subject of homicide will be found in my *Digest of the Criminal Law*, ch. xxiii., and *note*, xiii. p. 350. As the result of the inquiry there recorded I drew the Draft Code of 1878, and my Draft, after a most minute and searching discussion, was adopted, with few modifications, by the Commission of 1879.

homicide which can possibly occur in any time or country, or under any system of law:—



I will now proceed to examine it in detail.

It shows that in the nature of things there must be seven kinds of homicide in every country in which the intentional infliction of bodily harm is lawful in some cases and unlawful in others, and in which some acts are in themselves lawful and other acts unlawful. These conditions being fulfilled by the laws of all civilised countries, it may be said generally that there must be seven kinds of homicide. I can think of no case which does not fall under one, at least, of them, though no doubt some might fall under more than one.

So far the analysis of the offence depends upon the nature of things. I have next to consider how it is related to the law of England. By our law, four of these forms of homicide (viz., Nos. 1, 3, 6, and 7) are not punished as crimes, and three (viz., Nos. 2, 4, and 5) are so punished.

1. Homicide by an act intended to kill or hurt, the intention being lawful. This covers all cases of intentional justifiable homicide.

2. Homicide by an act intended to kill or hurt, the intention being unlawful. This covers all cases of intentional unlawful homicide effected by an act.

3. Homicide by an act not intended to kill or hurt, the act itself being lawful. Homicides of this kind are not unlawful unless the death is also caused by an omission to discharge a legal duty. All cases of pure accident fall under this head.

4. Homicide by an act not intended to kill or hurt, the act itself being unlawful. All homicides of this kind are by the law of England unlawful.

5. Homicides by an omission, amounting to culpable negligence to discharge a legal duty. These homicides are in all cases unlawful.

6. Homicides by an omission not amounting to culpable negligence to discharge a legal duty. These homicides are in no case unlawful in the sense of being criminally punishable, though they may involve civil liability.

7. Homicides by an omission to do an act not amounting to a legal duty. These homicides in no case involve any legal responsibility.

We are now able to form a distinct conception of homicide unlawful by the law of England, and it may be thus defined:—

[1] Homicide is unlawful—

(*a*) When death is caused by an act done with the intention to cause death or bodily harm, or which is commonly known to be likely to cause death or bodily harm, and when such act is neither justified nor excused by the principles stated above.

(*b*) When death is caused by an omission, amounting to culpable negligence, to discharge a duty tending to the preservation of life, whether such omission is or is not accompanied by an intention to cause death or bodily harm.

(*c*) When death is caused accidentally by an unlawful act.

It should be observed, in reference to this analysis of the subject, that every omission to discharge a legal duty intended to cause bodily injury must amount to criminal negligence. The omission must by the force of the term be negligence, and the presence of the intent to hurt must make that negligence criminal. Moreover, the question of justification or excuse can scarcely apply to such omissions, because circumstances which would justify the infliction of intentional injury by an act would usually prevent the duty supposed to be violated by the omission from arising.

With reference to the second head, it must be observed

[1] *Digest*, art. 222.

that there are cases of unlawful homicide which may be considered as falling under both of the heads of which the proposition consists. A man fires a gun down a street wantonly, and kills or wounds one of the passers-by. This may be described either as an unintentional homicide by an act in itself unlawful, or as homicide by an omission to use proper precautions in doing a dangerous act. The former is the more natural description of the two, but it is conceivably possible that some case might arise where the carelessness with which an act causing death was done was a more prominent feature in the transaction than the unlawfulness of the act.

It will however, I think, be found that every case of unlawful homicide which can be imagined, and in particular that all the cases referred to in the[1] 200 pages of *Russell on Crimes* which deal with this matter, fall under one or the other of the two heads just stated, which are equivalent to the somewhat longer statement given above. Putting the matter very shortly, indeed, and omitting qualifications, it may be stated that all unlawful homicide is either the result of unjustifiable, inexcusable, intentional violence, or the unintentional result of an unlawful act, or the result of carelessness in doing an act lawful or unlawful, or of an omission to perform a legal duty.

I now come to the distinction between murder and manslaughter, which is, that in murder the act or omission by which death is caused is attended by one or more of the states of mind included under the description of malice aforethought, whereas in cases of manslaughter malice aforethought is absent.

Upon this matter it must be observed, in the first place, that though the lawfulness or unlawfulness of homicide is determined in the manner already described by reference to the character of the offender's act as being intentional, careless, or otherwise, it is necessary, in order to determine the degree of guilt involved in his act, to discriminate between the different kinds of bodily harm which he may intend to do, and the different kinds of carelessness of which he may be

[1] 1 *Russ. Cri.* pp. 641-852, fifth edition.

CH. XXVI. guilty. The distinction has been worked out by slow degrees and in a cumbrous way by the labours of many generations of judges who have interpreted in reference to particular cases the expression "malice aforethought," which itself has a remarkable history. Passing over the history for the present, I give the result, which is that malice aforethought is a common name for the following states of mind preceding or co-existing with the act or omission by which death is caused:—

(*a*) An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not.

(*b*) Knowledge that the act or omission which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.

(*c*) An intent to commit any felony whatever.

(*d*) An intent to oppose by force any officer of justice in arresting or keeping in custody a person whom he has a right to arrest or keep in custody, or in keeping the peace.

By applying this definition of malice aforethought to the definition already given of unlawful homicide, we get the following results:—

In cases of unlawful homicide, death caused by an act or omission intended to cause bodily injury is murder, if the intention of the offender is to cause the death of, or grievous bodily harm to, any person whatever. It is manslaughter if the intention is to inflict bodily harm not grievous, unless the person on whom the bodily harm is intended to be inflicted is an officer of justice engaged in the execution of his duty, or unless the offender is engaged in committing a felony, in each of which cases it is murder to cause death by the intentional infliction of any bodily harm whatever.

Death caused unintentionally is murder if the unlawful act or omission by which death is caused is known to the offender to be eminently dangerous to life, or if the unlawful act amounts to a felony, or possibly if the person killed is an

officer of justice in the discharge of his duty. In other cases the offence is manslaughter, if anything.

Lastly, the presence of certain provocations given by the deceased, and not provoked by the offender, will reduce murder to manslaughter. I now proceed to give the history of this body of law.

HISTORY OF THE LAW OF HOMICIDE.

The Roman law on the subject of homicide was contained in the "Lex Cornelia de sicariis et veneficiis," and such parts of it as remain are to be found in title viii. of the 48th book of the *Digest*. It has had little influence on the law of England on the subject at any part of its history, and has, as it seems to me, little intrinsic merit, as it recognises few of the distinctions inherent in the subject.

In the early English laws the subject of homicide is frequently treated, though by no means so frequently as theft. In the laws of Æthelbirht provisions are made as to the "bot" to be paid for [1] slaying "in the king's tun," [2] "in an eorl's "tun," [3] "at an open grave," and the same code contains [4] various other provisions as to the bot to be paid by or for particular persons. In most of the laws provisions of greater or less elaboration occur as to the different sums to be paid as bot, were, or wite for different kinds of homicide. The sums vary partly, according to the position in life of the person slain, and partly according to the circumstances under which the homicide takes place. The provisions which throw any light on the definition of the offence, or which distinguish different kinds of homicide are few. The damages to be paid to the family of the deceased, and the satisfaction to be made to the person whose peace had been broken by the homicide, are much more prominent, and seem to have been regarded as much more important, than what we should call the criminal consequences of the offence. These, however, are not altogether unnoticed.

[1] Thorpe, i. 5; Æthelbirht, 5.
[2] *Ib.* p. 7, law 13.
[3] P. 9, law 22.
[4] See 6, 7, 23, 24, 25, 26.

CH. XXVI. The earliest and most important provisions of the kind are to be found in the laws of Alfred. [1] "Let the man who "slayeth another wilfully perish by death. Let him who "slayeth another of necessity or unwillingly, or unwilfully, as "God may have sent him into his hands, and for whom he "has not lain in wait be worthy of his life and of lawful "bot if he seek an asylum. If, however, any one pre-"sumptuously and wilfully slay his neighbour through guile, "pluck thou him from my altar to the end that he may "perish by death." Again, [2] "If an ox gore a man or a "woman so that they die, let it be stoned, and let not its "flesh be eaten. The lord shall not be liable if the ox "were wont to push with its horns for two or three days "before and the lord knew it not; but if he knew it and he "would not shut it in, and it then shall have slain a man or "a woman, let it be stoned; *and let the lord be slain*, or the "man be paid for, as the witan decree to be right."

"[3] If a thief break into a man's house by night, and he be "there slain the slayer shall not be guilty of manslaughter. "But if he do this after sunrise he shall be guilty of man-"slaughter, and then he himself shall die unless he were an "unwilling agent."

Whether these re-enactments of the Mosaic law were practically more than a kind of denunciation of homicide on religious grounds, or whether they were actually executed as law, it is now of course impossible to say; but it is obvious that the enactments themselves are very meagre. They roughly indicate a distinction between intentional and unintentional homicide, and point to premeditation or waylaying as a circumstance of aggravation; but they suggest that in every case whatever, even in the case of unintentional homicide, it was *primâ facie* lawful, and even proper, to slay the slayer, and as no exception is made excusing the person who

[1] Thorpe, i. 47; Alfred, 13. This is taken from Exodus xxi. 12, 13, 14:—
"12. He that smiteth a man so that he die shall be surely put to death.
"13. And if a man lie not in wait, but God deliver him into his hand, then "I will appoint thee a place whither he shall flee.
"14. But if a man come presumptuously upon his neighbour to slay him with "guile, thou shalt take him from mine altar that he may die."

[2] Alfred, 21; Thorpe, i. 47. This is taken from Exodus xxi. 28, 29.

[3] Thorpe, i. 51; Alfred, 25. This is taken from Exodus xxii. 2, 3.

exercises this right, a single homicide might lead to an endless blood feud, which perhaps often happened in those days.

The [1] laws of Ine contain some provisions as to wers and bots, and there is in the laws of Æthelstan a [2] provision which implies that if a "morth slayer" failed to get a proper number of compurgators he might be put to death. "Let it "stand within the doom of the chief men belonging to the "burh whether he shall have his life or not." "Morth" means "secret," and its use in the early laws seems not to be confined to cases of homicide, but to extend to all secret crimes. "Morth-works," deeds of darkness, is an expression occasionally used. This passage, however, is the first occasion known to me, on which any phrase occurs which at all resembles the word murder as the name of a kind of homicide. There are references to the weres payable for homicide in the laws of [3] Ethelred, and in [4] the ordinance respecting the Dunsetas, and in the [5] laws of William the Conqueror, and of Henry I. One curious provision on the subject occurs in the [6] laws of Cnut. "If there be [7] open morth so that a man "be murdered, let the slayer be delivered up to the kinsmen; "and if there be a prosecution, and he fail at the lād let the "bishop doom." This is the only case, with the exception of the passages already referred to in Alfred's laws, which I have found, in which homicide is treated as a crime in our sense of the word, rather than as a wrong, and even in this case the law rather gives the kindred an opportunity of revenging themselves than inflicts punishment.

The word "murdrum," as the Latinised form of "morth," first occurs in the laws of [8] Edward the Confessor, which

[1] Thorpe, i. 149 ; Ine, 74, 76. [2] Thorpe, i. 225 ; Æthelstan, 6.

[3] Thorpe, i. 287 ; Ethelred, 5. [4] Thorpe, i. 353, No. 5.

[5] "Si hom ocist auter, e il seit cunuissant" (confessing) "e il deive faire "les amendes, durrad" (I suppose shall give) "de sa manbote al seinur pur "le franch home x. sol. e pur le serf xx. sol."—Thorpe, i. 470 ; William, No. vii. In the *Leges Henrici Primi* there are two laws on this subject, lxix. and lxx. The last-mentioned law is extremely elaborate, providing for the cases of free men killing slaves, Welsh (Waliscus) slaves killing English freemen, Englishmen killing Danes (Dacus), Danes killing Englishmen, freemen killing each other, and people of the same or of different ranks killing each other, and many other cases. Thorpe, i. 572, &c.

[6] Thorpe, i. 407 ; Cnut, 57.

[7] It is suggested that this means a murder which has been discovered, and so become open. "Open secrecy" is a contradiction in terms.

[8] Thorpe, i. 448 ; Edw. Con. xv. xvi.

CH. XXVI

[1] purport to have been collected under William the Conqueror by commissioners appointed for the purpose. They often speak historically rather than in the present tense. The account contained in them of "murdrum" is as follows: "Quando aliquis alicubi murdritus reperiebatur querebatur "apud villam nisi inveniebatur interfector illius et si inveniri "poterat justicia regis infra viii. dies interfectionis tradebatur. "Si vero inveniri non poterat mensem et diem unum ad "eum perquirendum in respectum habebant, et si non invenie-"batur colligebantur in villa XLVI. marce." This being thought too heavy a burden for the township (the law proceeds) was imposed on the hundred. The history of the institution is then given: "Murdra quidem inventa fuerunt "tempore Cnuti regis; qui post adquisitam terram et secum "pacificatam, remisit domum exercitum suum precatu baro-"num de terrâ; et ipsi fuerunt fidejussores erga regem quod "illi quos retineret in terra firmam pacem haberent. Ita "quod si quis de Anglis aliquem ipsorum interficeret, si non "posset defendere &c., judicio Dei, ferro vel aqua, fieret justicia "de eo. Si autem aufugeret solveretur ut supra dictum est."

This law is a remarkable instance of the transition from the view that homicide was a wrong to the survivors, to the view that it was an offence against the state. The English nobility, to get rid of the bulk of the Danes, all go bail for the lives of those who remain. The liability for murder was thus extended over a larger area than it covered in common cases, though it was still regarded as a matter to be paid for.

The most important passage in the early laws relating to homicide, indeed the only one which looks as if it was intended to give any sort of definition of the offence, is to be found in the [2] *Leges Henrici Primi*. After the passage already referred to about weres, occurs a law (lxxi.) which begins as follows:—"Si quis veneno, vel sortilegio, vel "invultuacione seu maleficio aliquo faciat homicidium sive

[1] The laws are thus headed:—"Post quartum annum adquisicionis regis "Willelmi istius terre scilicet Anglæ consilio baronum suorum fecit summoniri "per universos patriæ comitatus Anglos nobiles, sapientes et in lege suâ "eruditos ut eorum consuetudines ab ipsis audiret."—*Ib.* 442.

[2] Thorpe, i. pp. 576-582.

"illi paratum sit sive alii nichil refert, quin factum morti-"ferum et nullo modo redimendum sit. Reddatur utique "qui fuerit reus hujusmodi parentibus et amicis interfecti, "et eorum misericordiam aut Judicium senciat, quibus ipse "non pepercit." In the notes to this law it is said that the first three lines are corrupt, but that the meaning appears to be that homicide by poison, witchcraft, wounding or other "maleficium" is inexpiable. There is a difficulty in accepting this view because elaborate provisions about weres and bots are made in other parts of the work, and indeed the law under consideration goes on to say, "si beneficio legis ad "misericordiam vel concordiam perturbatur, de wera mortui "plene satisfaciat, et witam et manbotum," &c. May not the meaning be that homicide by poison, witchcraft or fascination, whether directed against the deceased or any other person, is to be treated as a crime notwithstanding its mysterious character, and that it is to be regarded *primâ facie* as inexpiable? This view is strengthened by the fact that the law contains a provision that, in[1] a certain obscure contingency the matter is to be reserved for the Bishop's judgment.

The "diffinicio Homicidii" follows. It has no intrinsic value, but it seems to have been authoritative as it is to some extent used by Bracton. "Homicidium fit multis modis, "multaque distancia in eo est, in causa, et in personis. "Aliquando etiam fit per cupiditatem, vel contencionem "temporalium, fit etiam per ebrietatem, fit per jussionem "alicujus, fit etiam pro defensione et justicia"—"fit etiam "homicidium casu consilio."

These are the principal though they are not all the references to homicide in the laws before the Conquest as enacted by their various authors or as collected under William I. and Henry I. It will be observed that they treat homicide almost entirely as a wrong, that they do not in any case attempt anything approaching to a systematic definition of it, that the only approach to a distinction between different

[1] "Si res in compellacione sit, et emundacione miseveniat." I have no idea what this means. I guess that "invultuatio" means fascination, looking on a man with the evil eye.

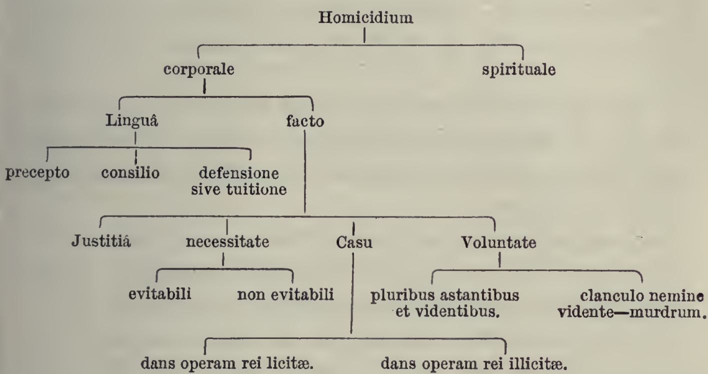
CH. XXVI. kinds of homicide is that which consists of the introduction of the word "morth-slaying," whence a little later comes "murdrum," which is distinguished from other forms of the offence not by any peculiarity in the offence itself, but by the fact that the criminal is unknown. Accidental death is referred to very shortly in two places in Alfred's laws.—[1] "If "at their common work one man slay another unwilfully let "the tree be given to the kindred, and let them have it oft "the land within xxx. days; or let him take possession "of it who owns the wood." [2] Another law (very obscurely worded) implies that if a man carries his spear heedlessly whereby another stakes himself on it, the carrier of the spear is to pay the were of the deceased.

Such was the law upon this subject at the time of, and soon after, the Norman Conquest. Its development after that event was very slow. [3] Glanville's account of the matter is in these words:—"Duo autem sunt genera homicidii. "Murdrum, quod nullo vidente, nullo sciente clam perpe- "tratur, præter solum interfectorem et ejus complices— "Est et aliud Homicidium, quod constat in generali "vocabulo, et dicitur, simplex Homicidium." This remark would, if the definition of murdrum were omitted, constitute a remarkable anticipation of the later division of the crime into murder and manslaughter, and if "nullo vidente, nullo "sciente clam perpetratur," is meant merely as a description of the circumstances under which murder is usually committed, and not as a strict legal definition, the passage may still be considered in that light. In the Assizes of Clarendon and Northampton the word "murdratores" occurs in connection with "robbatores," but the first writer who enters into the matter with any detail is Bracton.

Bracton, as I have already observed, considers the definitions of crimes in connection with the procedure for their punishment, and amongst others he considers homicide at considerable length and in several places. He first [4] defines

[1] Thorpe, i. p. 71; Alfred, 13.
[2] *Ib.* p. 85; Alfred, 36.
[3] Lib. xiv. c. 3.
[4] Bracton, ii. pp. 274-275; *De Coronâ*, ch. iv.

homicide "as hominis occisio ab homine facta," and he then proceeds to divide it in a way which may be exhibited in a tabular form as follows :—



These divisions says [1] Sir Horace Twiss, are taken from the Breviarium Extravagantium collected by Bernhard, of Pavia, from Decretals not collected by Gratian.

I do not see the use of the division into homicide *linguâ* and homicide *facto*. Homicide by command or counsel seems to belong to the general subject of accessories to which Bracton refers on several occasions, and what is meant by "homicide by the tongue by defence" I do not know.[2] The division of homicide *facto* into cases of justice, necessity accident, and intention, recognises some of the distinctions I have pointed out as the result of much subsequent experience, but it does so very imperfectly. The divisions are not mutually exclusive. All homicide by way of either justice or necessity is intentional. Moreover, the idea of necessity seems to exclude the adjective "evitabilis." The words were no doubt ill-chosen, and their adaptation to facts gave a great deal of trouble, and led to, or were used to excuse, many mistakes afterwards.

The distinction between voluntary homicide in the presence

[1] Preface, lviii.

[2] Bracton's own explanation hardly comes up to his statement: "Lingua "ut si quis dissuadet et sic dissuadendo retinebit aliquem a bono proposito "volentem alium liberare a morte et sic quodam modo indirecte facit quis "homicidium."—P. 278. Protecting a person in the commission of homicide by ordering others not to interfere, would be a similar case, and would correspond better with "defensione," but this is conjectural.

CH. XXVI. of witnesses and in the absence of witnesses is not only a distinction without a difference, or with only an accidental difference, but it is also open to the remark that if there are no witnesses it is impossible to say whether the homicide was *necessitate, casu,* or *voluntate,* (in Bracton's sense of the word).

[1]With regard to the punishment of homicide Bracton says, "Pœna vero homicidii commissi facto variatur: pro homicidio "vero justitiæ justa et recta intentione facto non est aliqua "pœna injungenda."

In speaking of appeals he says [2] "si felo convictus fuerit pro "morte hominis vel pro alia felonia, ultimo puniatur supplicio "sicut morte vel membrorum truncatione." In another passage it is implied that the punishment was usually death, [3] for he says that in certain cases persons suspected of murder "pœnam capitalem non condent."

Murder is considered by Bracton apart from homicide [4] in general. The definitions of murder and of homicide *voluntate* are as follows:—"[5] Voluntate ut siquis ex certâ scientiâ, et in "assultu præmeditato, irâ vel odio, vel causâ lucri, nequiter et "in feloniâ et contra pacem domini regis aliquem interfecerit."

"[6] Murdrum vero est occulta extraneorum et notorum "hominum occisio, a manu hominis nequiter perpetrata, et "quæ nullo sciente vel vidente facta est, præter solum "interfectorem et suos coadjutores et fautores, et ita quod "non statim assequatur clamor popularis." Bracton explains at length the different members of this proposition in a very minute way, of which the following is a specimen:— "Occulta dicitur, quia occisor ignoratur, nec scitur quis ille "fuit qui occidit. Item extraneorum et notorum hominum, "ut comprehendatis tam masculum quam fæminam et sic "excludatis animalia bruta quæ ratione carent. Extraneorum "dico, quia sive interfectus cognitus fuerit sive ignotus "dicitur Francigena, nisi Englescheria et quod Anglicus sit "probetur perparentes et coram justitiariis præsentatur." [7] He also gives a singular account of the manner of presenting

[1] Bracton, ii. 278. [2] *Ib.* 290. [3] *Ib.* 406.
[4] *Ib. De Coronâ*, ch. xv.; ii. p. 384.
[5] *Ib.* 278. [6] *Ib.* 384. [7] *Ib.* 390.

Englishry, which was differently understood in different parts of the country. He says, "In quibusdam vero comitatibus "præsentatur Englescheria sive mortuus fuerit masculus sive "fæmina, per duos masculos ex parte patris et per duas "fæminas ex parte matris, de propinquioribus parentibus in"terfecti, qui olim dicebantur to lange and to bred." (I suppose two long and two broad, *i.e.*, two ancestors and two collaterals.) "In quibusdam comitatibus præsentatur per unum "masculum ex parte patris et per unam fœminam ex parte "matris."

The effect of a presentment of Englishry was to free the hundred from the fine which was to be paid if the presumption that the person slain was a Frenchman was not removed. The fine as well as the offence was called "murdrum," and many rules as to the cases in which it was or was not payable are laid down by [1] Bracton. I have found no definition in Bracton as to what constituted Englishry. In his time about 200 years after the Conquest, the great mass of the population must have been both English born and the children and grandchildren of English born ancestors, and the presentment of Englishry must have begun at least to assume the character of a mere legal form, necessary in order to save the hundred from a fine, but otherwise almost unmeaning.

Various doctrines relating to homicide, which afterwards became and still are recognised as parts of the law of England, are to be found in Bracton. For instance, he lays down the rule that the blow of one is in certain cases the blow of all. [2] "Possunt autem esse plures culpabiles de "homicidio sicut unus, ut si plures rixati fuerint inter se, "in aliquo conflictu, et aliquis sit interfectus inter tales, nec "appareat ex quo nec ex cujus vulnere, omnes dici possunt "homicidæ, et illi qui percusserunt, et qui tenuerunt malo "animo dum percussus fuerit. Item et illi qui voluntate "occidendi venerunt licet non percusserunt. Item et illi qui "nec occiderunt, nec voluntatem occidendi habuerunt, sed "venerunt ut præstarent consilium et auxilium occisoribus."

Elsewhere [3] in defining "injuria" he has some remarks upon homicide which show the antiquity of certain parts of

[1] Bracton, 388-390. [2] *Ib.* 278. [3] *Ib.* 544-545.

CH. XXVI. our law. "Si quis unum percusserit et occiderit cum alium "percutere vellet in feloniâ tenetur. Item si cum levius "credidit percussisse, gravius percusserit et occiderit tenetur. "Debet enim quilibet modum et mensuram adhibere in suo "facto. Et est injuria talis quæ inducit ultimum suppli-"cium cum criminaliter agatur. Est et alia quæ non nisi "pœnam pecuniariam tantum et quandoque eandem pœnam "cum carceris inclusione secundum facti qualitatem." I do not feel sure whether this last clause means that assaults are sometimes punished with fine and imprisonment, or that assaults which cause death are so punished in some cases. If the latter is his meaning the law in his day was more rational than it afterwards became.

There are, however, some cases in which Bracton carries the law as to homicide to a length which was not adopted in later times. Thus, he says, [1] "Si sit aliquis qui mulierem "prægnantem percusserit vel ei venenum dederit per quod "fecerit abortionem, si puerperium jam formatum vel anima-"tum fuerit, et maxime si animatum, facit homicidium." In another passage he seems to imply that he regarded causing death by a voluntary omission to perform what was not a legal duty, as homicide. After [2] saying that those who command persons to strike or kill "immunes esse non "debeant a pœnâ," he adds, "nec etiam ille qui cum posset "hominem a morte liberare non liberavit." He took indeed to a great extent the ecclesiastical view of homicide, for he says that if a war is unjust "tenebitur occisor: si autem "justum sicut pro defensione patriæ, non tenebitur nisi hoc "fecerit corruptâ voluntate et intentione." He points out indeed that if a judge who justly condemns a criminal to death does so [3] "ex livore vel delectatione effundendi hu-"manum sanguinem, licet juste occidatur iste, tamen peccat "mortaliter" (Judex) "propter intentionem corruptam."

As to casual homicide, he distinguishes between casual homicide in a lawful act without negligence, casual homicide in a lawful act with negligence, and casual homicide in an unlawful act. In the two cases last mentioned the homicide is unlawful. This, again, is in accordance with

[1] Bracton, 278. [2] *Ib.* 280. [3] *Ib.* 275-276.

more modern decisions, and represents the existing law. In cases of casual homicide by a lawful act done without negligence Bracton thought that the person who caused the death committed no offence at all. He gives a curious illustration which must, I suppose, have occurred in actual practice. [1] "Si cum pilâ luderet quis manum tensoris [tonsoris] quem non vidit pilâ percussit, ita quod gulam alicujus "preciderit et sic hominem interfecerit, non tamen cum occi-"dendi animo, absolvi debet." This is the modern opinion, but it did not always prevail, as I shall show immediately. On the other hand he seems to lay down the rule to which I have already referred as having for a short time prevailed in this country that the will is to be taken for the deed, but the passage in which he does so presents some difficulties. He says "In maleficiis autem spectatur voluntas et non exitus." [2] CH. XXVI.

This is the substance of Bracton's account of the crime of homicide. It lays down, though not very correctly or systematically, some of the leading distinctions connected with the subject, but it is singular that, turning as it does so very largely upon moral considerations, its principal distinction—that between voluntary homicide and murder—should have no relation to morality; that it should take no notice of the different grades of evil intention which may accompany voluntary homicide; and that it should omit altogether the question of provocation. It classifies under the same head homicide by a sword and homicide by a blow with the fist, homicide by a person provoked in the highest degree, and homicide by a robber.

[3] Fleta copies and somewhat abridges Bracton. [4] Britton treats the subject very concisely. He omits many of the

[1] Bracton, ii. 398.

[2] Bracton, ii. 400. The rest of the passage is as follows: "Et nihil interest "occidat quis an causam mortis præbeat, sed ibi distinguitur inter veram "causam et infortunium de animalibus quæ ratione carent vel aliis rebus "inanimatis quæ dant occasionem, sicut navis, arbor quæ oppressit vel hujus-"modi. Recte autem loquendo, res firma sicut domus vel arbor radicata "quandoque non dant causam nec occasionem, sed facit ille qui se stulte gerit, "nec equus multotiens. Item nec navis, nec batellus in salsâ, licet in aquâ "dulci et hoc per abusionem sicut in multis aliis casibus." This is a singular and indeed obscure passage. The meaning of the words is plain enough, but it is difficult to follow the order of the ideas.

[3] Fleta, lib. i. chaps. 23, 30, 33, 34. In this last chapter the obscure passage quoted above is omitted.

[4] Britton, lib. i. chaps. vi. vii. vol. i. pp. 34-39.

CH. XXVI.

topics dealt with by Bracton, and adds to the cases stated by him, " Ceux ausi qi fausement par louver ou en autre manere " ount nul homme dampne ou fet dampner a la mort par faus " serment." He also states their punishment. [1] " Si juge- " ment face encountre eux si lour soit ajugé mort pur mort; " et lour biens moeble soiñt nosz et lour heyrs desheritez. " Et volums aver de lour tenementz de qi qe unques soiñt " tenuz le an et le jour."

The [2] *Mirror* contains little more on this head than an abridgment of Bracton.

As I have already observed, there are no text writers upon the criminal law between Bracton and his followers and Coke. The Year-books, so far as I can ascertain, make few references to the subject of the definition of homicide, though a large proportion of the cases in FitzHerbert relate to the procedure upon prosecuting for that offence. Some points, however, in the early history of the law are still ascertainable.

In the first place I may observe that murders of a particular class were separated from other cases of homicide by being classified as petty treason. The first reference to such an offence which I can quote is in the [3] 75th chapter of the *Leges Henrici Primi*, which describes it as being punished by flaying alive. " Si quis dominum suum occidat, si capiatur, " nullo modo se redimat, set de comacione vel excoriacione " severagentium animadversione dampnetur ut diris tor- " mentorum cruciatibus et male mortis infortuniis infelicem " prius animam exhalasse, quam finem doloribus excepisse " videatur; et si posset fieri, remissionis amplius apud inferos " invenisse, quam in terra reliquisse protestetur." The offence is elaborately compared to the sin against the Holy Ghost. In Bracton there is no special reference that I know of to this offence. Something a little like it is mentioned in [4] Britton, but in the statute of treasons (25 Edw. 3, st. 5, c. 2, A.D. 1350) it is fully defined: " And, moreover, there is another manner " of treason, that is to say, when a servant slayeth his master, " or a wife her husband, or when a man, secular or religious,

[1] Vol. i. p. 35. [2] Ch. i. s. 9. [3] Thorpe, i. p. 579.
[4] Britton, book i. ch. ix. vol. i. p. 40.

"slayeth his prelate to whom he oweth faith and obedience."[1] The use of this subdivision of murder I do not understand. There was some additional severity in the punishment, and accessories before and after were all principals, but the offence was originally clergyable as well as murder. It was, as I have [2] already said, excluded from clergy in 1496 by 12 Hen. 7, c. 7. It continued to exist as a separate offence till the year 1828, when it was enacted by 9 Geo. 4, c. 31, s. 2, that every offence which before the passing of that act would have amounted to *petit* treason should be deemed to be murder only and no greater offence.

A matter of more importance and interest, though it is in itself extremely obscure, is the origin of the division of the crime of homicide into different degrees. In Bracton, as I have shown at length, "murder" meant secret killing, involving a fine on the township. Homicide or manslaughter was the general name under which every sort of slaying was comprehended, and those forms of slaying which happened by pure accident or inevitable necessity were regarded as not being criminal. When the necessity was not inevitable, or when the accident was one for which the party was to some extent to blame, he was, according to Bracton, responsible.

The precise consequences of "tenetur" are not mentioned, and nothing is said as to the way in which the fact that the necessity was not inevitable, or the accident not free from blame, was to be decided. A series of authorities, which I now proceed to examine, and which were long misunderstood, show, I think, that this part of the law of homicide was the first to attract the attention of the courts, and that it led by degrees to the present law on the subject. I will give the authorities in the order of time. The first authority is a passage in Bracton which I have hitherto passed over. In stating the cases in which the hundred is not to pay the fine called murdrum, he says that [3] in the case of those who die by misadventure no fine shall be paid (nullum erit

[1] Long afterwards there seems to have been a doubt whether a child who killed his father or mother was guilty of petty treason, but it was held that it was not unless he acted as servant to them.—Lambard, 245.

[2] Vol. i. p. 463.

[3] Bracton, ii. 388.

CH. XXVI. murdrum), although in certain parts of the country the custom is otherwise. In 1267, by the statute of Marlbridge (52 Hen. 3, c. 25), it was enacted that "murdrum de cetero non "adjudicetur coram justiciariis ubi infortunium tantummodo "adjudicatum est, sed locum habeat murdrum in interfectis "per feloniam et non aliter." This, no doubt (though it was afterwards misunderstood), means that the local customs referred to by Bracton should be abolished, and that the principle laid down by him should be observed throughout England. It is further to be observed that there was no need to refer in this act to the cases of homicide under a necessity which might have been avoided. In a case where this happened the person who caused the death must of course be known, and when the person by whom the death was caused was known, no "murdrum" was due from the township. The only cases in which the act could apply would be cases in which some stranger who could not be identified as an Englishman was found dead under circumstances which led to the inference that his death was accidental, *e.g.* if he were found drowned with no marks of violence. The statute therefore throws little light on the subject, though its words, when rightly understood, seem to imply that killing "per infortunium" was in those days so far from being felony that the two were contrasted with each other.

The next authority is the Statute of Gloucester, in 1278 (6 Edw. 1, c. 9). It is in these words: "Le Rey comaunde "qe nul brief de la chauncelerie seit graunte de mort de home "de enquere si home occie autre par mesaventure ou sei "defendaunt on en autre manere par felonie, mes si tel seit "en prison e devaunt justices erraunz ou justices assignez a "Ghaole deliverer se met in pais de bien et de mal e len "trusse par pais qil eit fet se defendaunt ou par mesaventure "dunqe par record des justices face le Rei sa grace si lui plest."

That is, "The king commands that no writ shall be "granted out of the chancery of the death of a man to "inquire whether a man killed another by misadventure "or in self-defence, or in other manner [1] by felony, but if

[1] The translation in the Statute Book is "in other manner without felony," which is clearly wrong. Coke, in his exposition of the Statute of Gloucester

"such a person is in prison and before the justices in eyre or "justices of gaol delivery, puts himself on the country for "good or evil, and if it is found by the country that he "did it in self-defence or by misadventure then, on the "record of the justices, the king shall pardon him if he "will."

This act by its opening words abolished the writ *de odio et atiâ*, which was issued, as I have already explained, in order that a jury might say whether a person accused of homicide was accused duly or maliciously in order that in the latter case he might be bailed. It would seem from this statute that the commonest cases of accusations "de odio et atiâ" were cases of misadventure or self-defence. The survivors of the deceased in such cases were likely to accuse of wilful homicide those whose negligence or violence had caused their relation's death; and the statute provides that these cases are no longer to be bailable, and that when the trial comes on, the jury, if they think that the case was one of self-defence or misadventure, are neither to convict nor acquit, but to find specially to that effect, upon which the king, if he pleases, may, upon the record or report of the justices, pardon the party. What happened if the king did not pardon the party does not appear. [1] Coke thinks that the words "if he pleases" "are but words of reverence to the "king, for the king is obliged *ex merito justitiæ* to grant the "pardon." At the same time the necessity for a pardon shows that some degree of guilt was supposed to be attached to killing by misadventure or in self-defence.

Another act, which throws some light on the subject, is the statute 21 Edw. 1, st. 2, A.D. 1293, "de malefactoribus in parcis." This act, "ut malefactores in forestis, chaceis parcis "et warrennis de cetero plus timeant in eadem intrare et "malefacere quam consueverunt," provides that the foresters, parkers, or warreners, if they find trespassers who will not

(*Second Institute*, p. 314), prints "sans felony," and translates without felony, but the "par felony" appears in the Statutes of the Realm, the most authentic of all the editions of the Statute Book, and in Pickering's *Statutes*, where the translation is "without felony." Foster follows Coke, *Discourse of Homicide*, p. 282.

[1] *Second Institute*, 316.

CH. XXVI. yield themselves "after hue and cry made to stand unto the "peace, but do continue their malice," are not to be troubled or punished if they kill any such trespasser in arresting him, but they are warned against acting maliciously.[1] This act supplies a case of homicide which was regarded as absolutely justifiable. The forester or park-keeper was not to be "pun-"ished or disturbed" if he acted within the powers given by the act.

In 1310 [2]an entry appears upon the Parliament Roll of 3 Edw. 2, in answer to a petition complaining of the ease with which pardons were granted to homicides and other offenders, in these words: "Le Roy voet que desoremes ne soit graunte "pardon de felonie forsque en cas ou anciennement soleit "estre grantez cest a saver, si hom tue autre par mesad-"venture ou soy defendant, ou en deverie" (insanity) "et ce soit trove par record de justices." This seems to show that in such cases pardons were granted as of course.

The result of these authorities seems to be that, in the end of the thirteenth and the beginning of the fourteenth centuries, juries were bound in cases of trials for homicide, where the defence was misadventure or self-defence, to find specially that such was the case, upon which the king was bound to grant his pardon. Probably he would do so upon terms as to fines and forfeitures which would depend on the degree of blame which might be considered to attach to the defendant by reason of the avoidable nature of the necessity under which he had killed the deceased, if the case was one of self-defence; or the amount of carelessness he had shown if the case was one of accident. Several entries in the Year-books, given in [3] FitzHerbert, throw light upon this. The following are instances:—

S. being indicted for the death of N. and pleading not guilty, the jury found that S. and N. quarrelled on their way to the public-house, and in the course of the quarrel N. struck

[1] This act remained in force till it was repealed by 7 & 8 Geo. 4, c. 27, and strangely enough it was repealed, "as to India," by 9 Geo. 4, c. 74, s. 125.

[2] 1 *Rot. Par.* 443*b*.

[3] Corone, 284, 285, 286, and 287. All in 3 Edw. 3—eyre of Northampton, A.D. 1330.

S. with an ash stick on the head so that he fell, and S. got up and ran away as far as he could, and N. followed S. with the stick in his hand to kill him if he could, and drove him to a wall situated between two houses which he could in no wise pass; and when S. saw that N. wanted to kill him with the stick, and that he could not avoid death unless he defended himself, he took a certain [1] poleaxe and struck N. with it on the head, of which N. immediately died, and the said S. immediately after fled as far as he could. Wherefore the jurors said that S. killed N. in self-defence, and not by felony or of malice aforethought, and that he could not otherwise escape from death. Therefore S. is remitted to prison to wait for the mercy of the king in the custody of the sheriff. His chattels, xx. *s.*, [2] whereof the sheriff is to answer, and then S. is to purchase a pardon, &c.

This case is followed by two others (286 and 287), in each of which the circumstances were nearly the same, and in each of which the person accused is said to have fled for the offence, and accordingly to have had his chattels confiscated. The purchase of the pardon for the death seems, however, to have been independent of the chattels.

Other cases on the same iter (Nos. 288 and 289) illustrate the difference then made between excusable and justifiable homicide. In one the jurors acquitted men who, when a person refused to be arrested for felony and "repug-"nabat cum quodam gladio quantum potuit" [3] killed him. The following cases are somewhat similar (289, 290):—

There is one statute of considerably later date which throws some further light on this subject. It is 24 Hen. 8, c. 5, passed in 1532, and entitled, "That a man killing "a thief in his defence shall not forfeit his goods." The statute recites with the verbosity characteristic of Henry VIII.'s statutes, that it had been doubtful whether a person who killed any one who attempted to rob or murder him in his own house, or on or near the highway, was to forfeit his goods "as any other person should do that by chance-medley

[1] "Quend. polhack."
[2] "Und. viē. r̃ et puis purch. chr̃e de pardon, &c."
[3] "Quidam Johannes filius de B. qui obiit velociter ipsum appropenquavit et "caput ejus gladio amputavit ut ipsum qui se legi justic. non permisit."

CH. XXVI. "should happen to kill any other person in his defence," and enacted that for the future no forfeiture should be incurred in any such case, but that persons so killing should be entitled to be acquitted simply. This statute clearly proves that killing in self-defence did involve forfeiture of goods, as a rule, in 1532, whatever may have been the case in Bracton's time.

It is, I think, by no means improbable that (as [1] Foster suggested) this method of treating homicide in self-defence, or by accident, as matters requiring a pardon and possibly involving some forfeiture (though the evidence as to this in cases where there was no flight is not clear) may have been the last remnant of the old system of bot and wite, of which I have already spoken. In 1340 Englishry was abolished by 14 Edw. 3, st. 1. c. 4, which recites that "Moultz des mes-"chefs sont avenuz en divers pays d'Engleterre qils "navoient mis conisance de presentement d'Englescherie "parquoi les communes des countes estoient sovent devant "les justices errantz amercesz a grant meschief du people." Accordingly, "Soit l'Englescherie et le presentement dycel "pur toutz jours ouste."

The abolition of Englishry, which was a remnant of the effects of the conquest of England by Frenchmen, was by no means an unnatural step on the eve of the great war in which the English conquered France. The result of it was to cut away the ground of the distinction taken by Bracton between voluntary homicide in general and murder. The name "murder," however, had no doubt come into common use, though the presentment of Englishry had, as the statute tells us, come to be so antiquated and unfamiliar that fines on the county for the want of it were regarded as mere acts of oppression. The word murder therefore would naturally become the name of the worst kind of homicide.

Homicide would thus consist of (1) murder, indistinctly conceived of as the worst species of the offence; (2) homicide per infortunium et se defendendo, which, though blameable to some extent, involved no other consequences than expense in getting a pardon, forfeiture of goods, and imprisonment

[1] P. 287.

before trial; and (3) justifiable homicide, which entitled a man to be acquitted. The large number of cases of homicide which, without belonging to the very worst class of all, were neither justifiable nor cases of misfortune or self-defence, were distinguished by no particular name, but were capital felonies, though not called murders.

The next step in the history of the later definition consists in the adoption of the expression "malice aforethought" as the characteristic specific distinction of murder as distinguished from other kinds of homicide. The forms of the special findings of the jury in the cases to which I have already referred show how it came about. They show that in order to entitle a man to a pardon on the ground of his having committed homicide *se defendendo*, it was necessary for the jury to find that he did it "in self-defence and not by felony or of "malice aforethought;" and as the special finding is required by the Statute of Gloucester, which abolished the writ "de "odio et atia," I think it highly probable that "malice afore-"thought," the absence of which juries had to find specially is the equivalent of the "odium et atia" the presence of which in the accuser—not in the accused—had to be found specially before the accused had a right to the writ "de ponendo in "ballium."

The next incident to be mentioned is a note in the Year-book, 21 Edw. 3, p. 17B. (A.D. 1348). It is in these words:—[1] "Note—That a man was convicted of having killed "another in self-defence, and, notwithstanding, his chattels "were forfeited, though his life is safe. The reason is, that "at common law a man was hanged in this case as much "as if he had done it feloniously, and, although by the sta-"tute (Marlbridge, 52 Hen. 3, c. 25) the king has spared "his life, his goods remain under the common law." This is a remarkable passage, as it shows that in the course of the eighty-one years, between the Statute of Marlbridge (1267) and 21 Edw. 3 (1348), the old law had been

[1] "Nota q̄ un home fut trove culp̄ q̄ il avoit occis un autre se defend. et "cela nient obstant ses chateux fur̄ forfaits, coīnt q̄. sa vie sera sauve ; et la "cause fut parce qu'al comon ley home fut pendu in cet cas auxi avant si come "il eut ce fait felonisement ; et coment q̄ le Roy ne p̄ le statut ait relesse sa "vie ses chateux demeurent al comon ley."

CH. XXVI. completely forgotten. The note cited is obviously founded upon a mistake as to the meaning of the Statute of Marlbridge. The words "Murdrum de cetero non adjudicetur coram justi-"ciariis ubi infortunium tantummodo adjudicetur" must have been construed, "Killing by misadventure shall not be "held before the justices to be murder," in ignorance of the fact that "murder" meant the fine on the township. The recital of the statute of 1340 abolishing Englishry shows how natural the mistake was. It seems, however, that this mistake had the practical result of attaching the forfeiture of goods as a consequence to a verdict of "se defendendo."

It is remarkable that the belief in the recent existence of such a monstrous state of the law as that a man should be hung for killing another in self-defence, should have found ready acceptance with an official reporter as the author of the Year-book in question was. [1] Coke, however, accepts his view without hesitation.

We come next to a remarkable entry in the [2] Parliament Roll for 1389 (13 Rich. 2). At this period the royal power was at a lower ebb than it ever fell to again till the civil wars. The Commons petition the king against the abuse of charters of pardon for murder, treason, and rape which "ount "este trop legerement grauntz devant ces heures a graunt con-"fort de toutz male fesors." They pray that no such pardons may be granted, and that if any archbishop or duke asks for such a charter he may forfeit to the king £1,000, a bishop or earl 1,000 marcs, an abbot, prior, baron or banneret 500 marcs, a clerk, knight bachelor, or person of less estate 200 marcs and be imprisoned for a year. Every pardon so granted to be void, and the person who has solicited the pardon to be liable to the penalty as soon as the offender is convicted. The petition implies that it was then usual to solicit and to grant pardons for the gravest offences before trial, which pardons could be pleaded at the trial.

The king's reply is, "Le roy voet sauver sa [3] liberte et

[1] Coke, *Second Institute,* upon Stat. de Marlbridge.

[2] 3 *Rot. Par.* 268*a*.

[3] Here "Liberty" is used in its true sense of franchise or special power. Somewhere, I think in Clarendon, it is said that the king of England is "as "free and absolute" as any king in the world, and this was the real meaning

"regalie comes ses progenitours ount faitz devaunt ces heures," and it then goes on to give a modified assent to the petition of the Commons, "Null chartre de pardon desore soit alowe "devant q̄conq̄ justice pur murdre, mort d'ōme occis par "agait assaut ou malice purpense, treson ou rape de "femme si mesme la murdre ou mort d'ōme occis par agait "assaut ou malice purpense, treson, ou rape de femme ne "soient especifiez en meme la chartre. Et si chartre de mort "d'ōme soit alegge devant q̄conq̄ justicez, en quele chartre "ne soit especifie q̄ celuy de qi mort ascun tiel soit arraigne "fuist mourdrez ou occis par agaite, assaut, ou malice purpense "enquereront les justices par bone enqueste de visne ou le "mort fuist occis, s'il fuist mourdrez, ou occis par agaite, as-"saute, ou malice purpense. Et s'ils trovent q'il fuist mourdrez, "[1] ou occis par agait, assaut, ou malice purpense, soit la chartre "disalowe, et soit fait entre solonc ceo q̄ la ley demaunde." It is also provided that when any person solicits such a pardon, the chamberlain, or vice-chamberlain, who endorses the bill is to put upon it the name of that person. The pardon is to pass both the Privy Seal and the Great Seal, "except in cases "where the chancellor can grant it by his office without "speaking to the king"—words which obviously refer to the pardons of course, already referred to in cases of self-defence, misfortune, and insanity. Somewhat lighter penalties than those suggested by the Commons are imposed upon persons soliciting pardons in such cases. This appears in the Statute Book as 13 Rich. 2, s. 2, c. 1. The penalties imposed upon persons soliciting pardons were repealed three years afterwards by 16 Rich. 2, c. 6 (1392), but the rest of the statute is still in force. It has been little, if at all, noticed by the writers on the subject; for instance, Coke passes it over, and so do Hale and Foster. It seems to me to form the first statutory recognition of the expression "malice aforethought," which as I have shown had been previously employed by juries in finding special verdicts of *se defendendo*. It may, indeed, be

of the phrase "free monarchy," which eminent persons in our own time employed, in order to give an attractive appearance to monarchical government.

[1] This is almost identical with the definition of "assassinat" in the Code Pénal, art. 296: "Tout meurtre commis avec premeditation ou guet-à-pens "est qualifie assassinat."

CH. XXVI. regarded as an indirect new statutory definition of murder, and may be compared to the indirect statutory definition of seditious libel by 60 Geo. 3, and 1 Geo. 4, c. 8, already commented upon.

The next stage in the history of this definition consists in the statutes which by degrees excluded the crime of murder from benefit of clergy. They were 12 Hen. 7, c. 7 (1496) which applied to petty treason, 4 Hen. 8, c. 2 (1512), 23 Hen. 8, c. 1, ss. 3 and 4 (1531), and finally 1 Edw. 6, c. 12, s. 10 (1547), the details of which have [1] already been noticed. In these acts the expressions used are "wilful prepensed murders," "prepensedly murder" (13 Hen. 7), "murder upon malice prepensed" (4 Hen. 8), "wilful murder of malice prepensed" (23 Hen. 8), and "murder of malice prepensed" (1 Edw. 6). Up to this time it appears from what has been already said that though there may be said to have been a legal definition of murder as distinguished from other forms of homicide, it was a distinction which made hardly any difference, for all homicide, unless it was justifiable, *se defendendo* or by misadventure, was felonious and so punishable with death, and was also within benefit of clergy whether it did or did not amount to murder. Thus the only distinction between murder and what we should now call manslaughter, consisted in the fact that murder by waylaying, assault, or malice prepense was not within the terms of any general pardon.

Two acts may here be mentioned which have a place in the history of the law of homicide. In 1530 the offence of poisoning was made high treason by 22 Hen. 8, c. 9. [2] This was on the occasion of the poisoning, by one Rouse, of a number of poor people entertained by Fisher, the Bishop of Rochester. The operative words of the statute are, "Every wilful murder of any person—hereafter to be com-"mitted or done by means or way of poisoning—shall be "deemed to be high treason." The offenders were to be excluded from clergy and boiled to death. In 1547 all new treasons enacted by Henry VIII. were repealed by 1 Edw.

[1] Vol. I. p. 464.
[2] Froude's *History*, i. p. 301. Mr. Froude quotes the statute verbatim.

6, c. 12, which provided (s. 13) that all wilful killing by poisoning shall be adjudged wilful murder of malice prepensed. In his famous judgment in [1] R. *v.* Mawgridge, to which I shall refer more particularly hereafter, Holt says, that this act was passed because "poison did not come under the "ancient definition of Bracton which is said to be 'manu-"'hominum perpetrata,' or of the statute 13 Rich. 2, s. 2, "c. 1" (the statute forbidding pardons, already referred to as giving the first statutory definition of murder). This, I think, is a mistake, as the act of Henry VIII. speaks of "murders by poisoning," and "wilful murder by way of poisoning," as offences which might then be committed. The act of Edward VI. must, I think, have been passed in order to put poisoning back into the category of offences from which the act of Henry VIII. had removed it. It must also be remembered that poisoning was in 1530 a clergyable felony. Murderers (not being clerks in holy orders) were first excluded from clergy in the following year by 23 Hen. 8, c. 1. The act of 1 Edw. 6, c. 12, took away benefit of clergy in all cases of "murder of malice prepensed," so that the only difference it made as to poisoning was to do away with the punishment of boiling alive, and to establish as a matter of law what one would think was plain as a matter of fact, namely, that killing by poison involved malice aforethought.

We have thus arrived at the point at which homicide was finally divided into two main branches, namely, murder which is unlawful killing with malice aforethought, and homicide in general, which is unlawful killing without malice aforethought, the one offence being within, the other without, benefit of clergy. The subsequent history of the definition consists mainly, though not entirely, of the process by which a definite meaning was put upon the words "malice aforethought." One point, however, suggests itself on which I am sorry to be unable to throw any light. If the law as to clergy was carried out rigidly in regard to homicide its severity must have been frightful. For instance, two men on a sudden quarrel, fight with their fists, one kills the other. If the man who killed the other was married to a widow he would be

[1] Kelyng, 173.

CH. XXVI. hanged. So every woman who killed any one otherwise than by accident or *se defendendo* would be hanged. This extraordinary severity was followed by a scandalous laxity which lasted till the reign of George IV. When all persons were entitled to benefit of clergy for every kind of manslaughter the utmost punishment that could be inflicted on a man who, upon receiving a blow with a fist, laid his assailant dead with a pistol, was a year's imprisonment and branding on the brawn of the thumb.

In the end of the sixteenth and the beginning of the seventeenth centuries the criminal law was for the first time made the subject of special treatises which to a great extent altered both its form and its substance, and I will now proceed to give an account of the most important of these writings.

The first is Staundforde's *Pleas of the Crown.* Staundforde was a judge in the Court of Common Pleas in the reign of Queen Elizabeth, and [1] published his work on the Pleas of the Crown in the latter part of the seventeenth century. The part of his work which relates to homicide is little more than a commentary upon Bracton. He quotes at full length the passages to which I have referred, and appends to them references to a variety of decisions, and some few statutes, most of which I have already noticed. His account of the change in the definition of murder, is expressed with some quaintness, but as I think with perfect correctness. After stating the modern definition to be killing with malice prepense, he adds: [2] "Le nomme de murder ne fuist unque "chaunge, mes le ley ceo reteignoit continuelment par le "haynoustie del crime a mitter difference inter homicide par "chaunce medley et homicide perpetre per voye de murder." Staundforde seems to have thought that the words "malice "prepense" required no explanation. He contrasts murder with chance medley, and so recognises two kinds only of voluntary homicide, namely, voluntary homicide with malice prepense, and voluntary homicide upon a sudden quarrel.

[1] My edition is dated 1607, but I do not think it can be the first.

[2] Staundforde, 19A. Staundforde's French is already very piebald, though it is not so bad as law French became in another century.

The subsequent history of the definition shows what a superficial view of the subject this is, and what important distinctions it altogether fails to notice.

The principal part of Staundforde's commentary upon Bracton consists of authorities which show how far Bracton's distinction between inevitable and evitable necessity had been reduced to a certainty. He specifies as cases of inevitable necessity killing in order to arrest, and the cases mentioned in the two statutes above referred to, namely, 21 Edw. 1, "de malefactoribus in parcis," &c., and 24 Hen. 8, c. 5, as to killing robbers and burglars. As cases of avoidable necessity he reckons all cases of killing in self-defence other than those protected by the statute of Henry VIII., even if the act was necessary to save the life of the person killing. In such cases, says Staundforde, the person slaying, though entitled to purchase a pardon as of course, forfeited his goods. He thinks that this was so whether they fled for it or not, and referring to the cases in the Year-books, in which it was found that they did fly for it, he says: "Doyomus penser que "lenquere del fugam fecit fust come surplusage." He also says that [1] in killing by misadventure the goods of the slayer are forfeited.

Between the publication of Staundforde's work and that of Lambard, the next writer to be noticed, an act was passed which shows clearly that at that time the words "malice prepense" in the statutes excluding murder from clergy were construed in their popular sense. This was the act called the Statute of Stabbing, 2 Jas. 1, c. 8 (A.D. 1604), said to have been passed on the occasion of frays then common between Englishmen and the Scotchmen who resorted to the court of James I. The preamble says that the act is passed "To the end that stabbing "and killing men on the sudden, done and committed by "many inhuman and wicked persons in the time of their "rage, drunkenness, hidden displeasure, or other passion of "mind" may be restrained. "Every person . . . . which ". . . . shall stab or thrust any person or persons that hath "not then any weapon drawn, or that hath not then first

[1] Fo. 16, ch. 8.

CH. XXVI. "stricken the party, which shall so stab or thrust so as the "person so stabbed or thrust shall thereof die within the "space of six months then next following, although it cannot "be proved that the same was done of malice forethought, " . . . . shall be excluded from the benefit of his clergy, and "suffer death as in case of wilful murder."

The obvious natural meaning of this act is that as the law stood in 1603 it was considered that a person who killed another "on the sudden," even without provocation or on any slight provocation, was guilty of manslaughter only; but however this may be, it was most unskilfully drawn, and had to be explained away. It assumes that no provocation except drawing a weapon or actual striking could be sufficient provocation to reduce killing by a stab from murder to manslaughter. This produced so harsh a result that the judges would not apply it. [1] The following are instances: A man is assaulted by thieves in his own house, the thieves having no weapon drawn nor having struck him. He stabs one. This is within the express words of the act, but was held to be justifiable homicide. An officer pushed abruptly and violently into a gentleman's chamber early in the morning to arrest him, not telling his business. The gentleman, not knowing he was an officer, stabbed him with a sword. This was held to be manslaughter at common law, though it was within the words of the statute, and the same was held as to a person stabbed by mistake under the supposition that she was a thief. The strongest case of all is that of a man stabbing an adulterer. This was held not to be within the act, but it was not determined till long after the statute of stabbing was passed that to kill an adulterer was manslaughter and not murder. At last, in 1666, [2] it was agreed by all the judges that this statute "was only a declaration of the common law, and made to "prevent the inconveniences of juries, who were apt to believe "that to be a provocation to extenuate a murder which in "law was not." The grounds of this resolution are not given, but I do not think that any better ground could have been

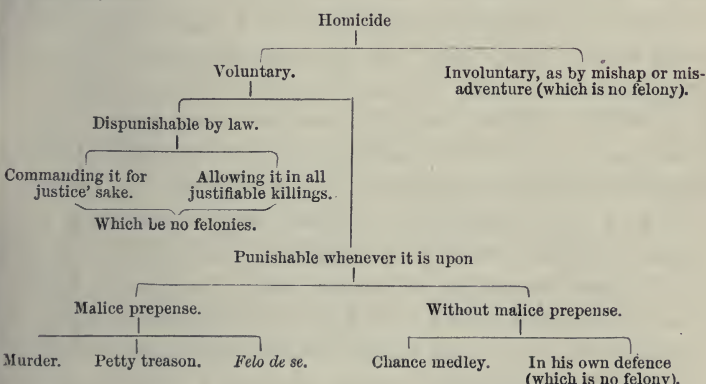
[1] All these cases are cited in Foster, p. 299.

[2] Kelyng, p. 88 (ed. of 1873), p. 55 of old editions. See too Foster, p. 298, and 1 Hale, p. 456.

CH. XXVI.

given than that the meaning attached by Coke and other writers and judges of the seventeenth century to the words "malice prepense" in the statutes of Edward VI. and Henry VIII. was such as to supersede the necessity for the Statute of Stabbing. This is by no means the only instance in which the development of the common law by judicial decisions and by text writers has superseded statutes intended to enlarge its scope, so that the statute resembles an ancient sea-wall superseded by the receding of the sea in front of it.[1]

The next writer on the subject important enough to be noticed was Lambard, whose work was published in 1610. His account of homicide is far simpler, more consecutive and natural than Coke's, and though not free from an element of fiction, has much less of it than was afterwards introduced into the subject. He [2] gives the following tabular view of homicide :—



This table is not quite a complete statement of the [3] contents of Lambard's work on this subject, as it does not show that to kill involuntarily was in Lambard's time punishable

[1] Foster is very indignant against this unlucky statute, and points out with malignant satisfaction a number of points which had arisen or might arise upon it. He says: "If the outrages at which the statute was levelled had "been prosecuted with due rigour, and proper severity, upon the foot of "common law, I doubt not an end would have been put to them without "encumbering our books with a special act for that purpose, and a variety of "questions touching the true extent of it. This observation will hold with "regard to many of our penal statutes, made upon special and pressing "occasions, and savouring rankly of the times." He adds, "The judges "have wisely holden a strict hand over this statute."—Pp. 300-301.

[2] Pp. 224-225.

[3] Cf. pp. 254-255, with the table.

CH. XXVI. by forfeiture of goods if the act causing death was lawful, and that it might amount to a felony, apparently either murder or manslaughter, if the act was unlawful or felonious. The leading distinction between voluntary and involuntary is taken from Bracton, and Lambard seems to have understood by those words intentional and unintentional. He does not appear to have asked himself the further question what particular intention he meant, but the contents of his work seem to imply that he meant an intention to inflict bodily harm of some sort on some person.

Lambard is, I think, the first writer who gives an account of the meaning of malice aforethought, showing that the unsatisfactory character of the phrase was beginning to be understood. He does not attach any artificial meaning to the phrase itself, but assumes that it bears its natural and obvious sense of premeditation. He then states the cases of what was afterwards called implied malice, in a way which involves some fiction, but much less than was afterwards imported into the subject. He [1] says, "Many times the law doth by "the sequel judge of that malice which lurked before within "the party, and doth accordingly make imputation of it. "And therefore if one (suddenly and without any outward "show of present quarrel or offence) draw his weapon and "therewith kill another that standeth by him, the law judgeth "it to have proceeded of former malice, meditated within "his own mind, however it be kept secret from the sight of "other men. . . . And it hath been adjudged murder when "a man hath drawn his weapon, and killed either a known "officer, or one that had and showed sufficient warrant to "arrest him for debt only. . . . Again, it is better for "a rule that wheresoever a man goeth about an unlawful act "as to beat a man or to disseize him of his lands, &c., and do "(in that attempt) kill him, it is murder, because the law "presupposeth that he carrieth that malicious mind with him "that he will achieve his purpose though it be with the death "of him against whom it is directed. And therefore if a thief "do kill a man whom he never saw before and whom he "intended to rob only, it is murder in the judgment of law,

[1] P. 205.

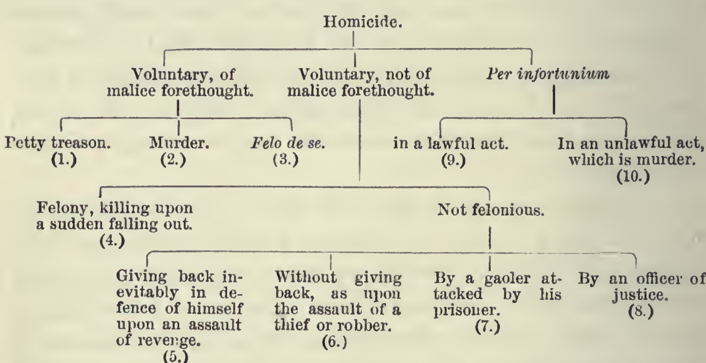
"which implyeth a former malicious disposition in him rather "to kill the man than not to have his money from him."

Of these three cases it may be observed that the first (sudden killing without apparent provocation) is rational enough as Lambard puts it. If A. suddenly but obviously intentionally kills B. without any apparent motive, it is no doubt reasonable to suppose that he had some motive which was not apparent, but Lambard's statement is incomplete, for it takes no notice of the case of sudden killing in which there really is no antecedent malice, as, for instance, killing upon a slight provocation or in mere wantonness. It is impossible not to ask why a man should in such a case be in any better position than one who kills another suddenly for some unknown cause; and it is also not obvious why a fiction should be employed in order to put him in the same position. Probably the word "prepense" in the statute of Edward VI. was felt to be a difficulty. The difficulty might have been avoided by the reflection that the motive must, in the nature of things, precede the act caused by it, and that the statute says nothing as to the length of time during which the premeditation must last. This was pointed out long afterwards, but not till the attempt to evade the law had made it hopelessly confused.

As to the case of killing officers of justice, Lambard merely states the rule of law, that such a killing was held to be murder without attempting to reconcile it to the words "malice prepense." It might have been reduced to a case of sudden killing without provocation, which he does deal with. Execution of the due process of law ought not to be regarded as a provocation. The third case of the thief killing when he intended only to rob, is well explained by Lambard, if the killing is supposed to be by intentional dangerous violence, but not so well if it is supposed to be not only the unintentional, but also the improbable effect of minor violence. The law can hardly be justified in "presupposing" that a thief "carrieth that malicious mind that he will achieve "his purpose though it be with the death of him against "whom it is directed," from the fact that he trips a man up in order to rob him and happens to kill him.

CH. XXVI.

I now come to Coke's *Third Institute*, a work which, not by reason of its own merits, but because of the reputation of its author, may be regarded as the second source of the criminal law, Bracton being regarded as the first. Coke's account of homicide is to the last degree unsystematic and ill-arranged. It begins with petty treason, goes on to murder, and then passes to homicide, though petty treason is only a species of murder (as is well and clearly pointed out by [1] Lambard), and murder a species of homicide. The disorderly character of the author's mind is well illustrated by the circumstance that Coke gives, under the head of petty treason, an account of the trial of peers by their peers, and that between petty treason and murder he interposes, amongst other things, heresy and witchcraft. The chapter on homicide, however, contains [2] one passage which aims at treating the subject systematically, and which may be exhibited in a tabular form as follows:—

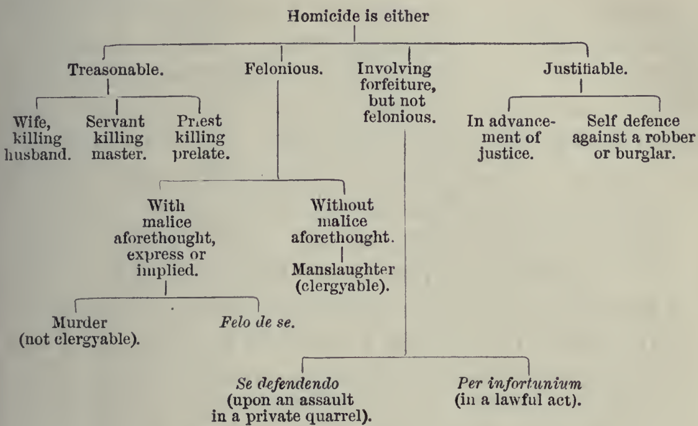


The intricacy and clumsiness of this arrangement are self-evident. It mixes up distinctions which are merely technical (felonious and not felonious) with distinctions which exist in the nature of things (voluntary and accidental), and in a technical point of view it is so clumsy that it puts some murders under head 2, and others under head 10. Besides, the circumstances which distinguish 6, 7, and 8, are distinctions without any difference. The following would have been an

[1] Pp. 244-246.

[2] P. 54.

intelligible way of classifying the law of homicide as it stood in Coke's time :—



This division of the subject is no doubt technical, but it is at least consistent, as it shows the relation to each other of the different technical rules which then prevailed. It differs little from the scheme given by Lambard. It classifies the subject according to the consequences then attached by law to different kinds of killing, distinguishing those which were regarded as being treason, felony, punishable by forfeiture of goods only, and free from all legal penalties. It is, however, very far from taking in all kinds of homicide, or from giving a rule by which they could be classified. For instance, it omits nearly all cases of killing by omission. A man who carelessly goes to sleep and leaves the ventilating doors of a mine shut when they should be open and so causes an explosion and death, cannot properly be said to kill a person by misadventure; and though he might under our modern law be said to kill him feloniously without malice aforethought, this would not be true according to Coke's classification, for he confines manslaughter of that kind to killing "upon a sudden falling out." The truth is that this case, like some others, is omitted, and it shows how imperfectly the matter had been considered in Coke's time. On most of these heads Coke adds little or nothing to what has already been referred to as having been stated by earlier

CH. XXVI. writers. The great point in which he differs from Staundforde is in giving an account of malice aforethought, which has been the source of much of the obscurity and intricacy in which the subject has been involved. "[1] Malice prepense," says Coke, "is when one compasseth to kill, wound, or beat "another, and doth it *sedato animo.* This is said in law "to be malice forethought prepensed—*malitia præcogitata.*" [2] It is implied in three cases, (1) "If one kills another without any provocation on the part of him that is slain." (2) "If a magistrate, or known officer, or any other that hath lawful "warrant, and in doing or offering to do his office, or to execute "his warrant, is slain, this is murder by malice implied by law." (3) "In respect of the person killing. If A. assault B. to rob "him, and in resisting A. killeth B., this is murder by malice im-"plied, albeit he" (A.) "never saw or knew him" (B.) "before. If "a prisoner by the duress of the gaoler cometh to an untimely "death, this is murder in the gaoler, and the law implieth "malice in respect of the cruelty. . . . If the sheriff, or other "officer, where he ought to hang the party attainted accord-"ing to his judgment and his charge rule against the law, "and of his own wrong burn or behead him, or *e converso*, the "law in this case implies malice in him."

This positive definition must be completed by reference to a negative definition given in the chapter on homicide.[3] "Some manslaughters be voluntary, and not of malice fore-"thought upon some sudden falling out. *Delinquens per iram* "*provocatus puniri debet mitius.* Another, for distinction's "sake, is called manslaughter. There is no difference between "murder and manslaughter, but that the one is upon malice "forethought, and the other upon a sudden occasion, and "therefore is called chance medley."

This is practically the root of the branch of the law as to malice aforethought, which has given rise to so many decisions.

It contains little which is not contained in Lambard, but Coke writes with an air of authority to which Lambard made no pretension, and his writings have in fact had extraordinary influence on every part of the law. It is therefore necessary to consider what he says carefully.

[1] *3rd Institute*, p. 50. [2] *Ib.* p. 51. [3] *Ib.* p. 55.

The positive part of his definition of "malice prepensed, "is where one compasseth to kill, wound or beat another, and "doth it *sedato animo*."

This definition gives an unnatural meaning to the word "malice," a word which naturally means ill-will in general, and refers not to the intention, but to the motives of the person who feels it. However, the definition appears to have been forgotten as soon as it was given, for the first case of implied malice is where "one killeth another without any "provocation." This obviously means killing another intentionally without provocation, for where a man kills another accidentally without provocation there is no malice expressed or implied. But if the killing is intentional the malice is by the definition express. Moreover, the mind may be just as sedate in executing an intention suddenly conceived, as in executing an intention of long standing. Why then does Coke call it a case of implied malice? Simply because having defined express malice in an unnatural sense, he used the word in its natural sense as soon as he came to speak of implied malice.

The other cases of implied malice are open to the same or similar remarks. The first is "If a magistrate or known "officer, or any other that hath lawful warrant, and in doing "or offering to do his office, or execute his warrant, is slain, "this is murder by malice implied in law." The third, "If "A. assault B. to rob him, and in resisting A. killeth B., this "is murder by malice implied, albeit he never saw or knew "him before." Each of these is a case in which "one "compasseth" (goes about, takes a step towards) "to kill, "wound, or beat another," and each is a case in which a man may act with a sedate mind, so that Coke's definition of malice in fact actually covers the three cases of malice implied by law. If Coke had contented himself with saying that malice meant an intention to inflict bodily injury not justified or excused, or mitigated by law, and that prepensed meant only that the intention must be formed before the injury was inflicted, he would have said very nearly what he did actually say, without employing any fiction whatever; and if he had added that the word likewise included reckless

CH. XXVI. indifference as to whether bodily injury was caused or not, he would have made his statement complete, and have spared the necessity for an infinite number of later decisions. It is the more remarkable that he failed to do so, because in another part of the *Third Institute* he all but says it. In commenting on 5 Hen. 4, c. 5, which makes it felony to "cut out the tongue or put out the eyes of any of the king's "lieges with malice prepensed," he says, "Malice prepensed, "that is, voluntary and of set purpose, though it be done "upon a sudden occasion; for if it be voluntary the law "implyeth malice." No fiction would have been necessary in order to make such a statement, for malice means nothing but wickedness, though by always affecting to explain it by the word [1] *malitia* in Latin, Coke constantly tries to make it look mysterious. As far as wickedness goes it is difficult to suggest any distinction worth taking between an intention to inflict bodily injury, and reckless indifference whether it is inflicted or not.

It is remarkable that up to this point there is no recognition, so far as I know, of several of the most important distinctions connected with the modern law of homicide. Of these I will mention two. The first is the rule that a difference in the degree of bodily violence intended to be inflicted may make the difference between murder and manslaughter. As the law now stands, if a man stabs another with intent to do him grievous bodily harm, and in fact kills him, he is guilty of murder. If he intentionally strikes him a blow with his fist or with a small stick with no intention to inflict any great harm, and happens to kill him, he is guilty of manslaughter. I have found no trace of any such distinction in Coke or his predecessors. The view taken by Coke is

[1] "*Malitia*" is thus defined in Facciolati's *Lexicon*: "*malizia, furberia,* "*κακια, κακουργια, calliditas, fraus.*" He gives these examples: "Virtutis "contraria est vitiositas, sic enim malo quum malitiam appellare eam quam "Græci *κακιαν* appellant, nam malitia certi cujusdam vitii nomen est; "vitiositas omnium."—*Cic. de Nat. Deor.* iii. 30. "Est enim malitia versuta "et falsa nocendi ratio," pro *Ros. Com.* c. 16. These and other instances seem to imply that *malitia* in Cicero's time was a somewhat narrower word than our "wickedness." I do not think, however, that Coke can have had this in his mind. It will be found that he always writes Latin when he is not quite sure of his own meaning.

expressed as follows: [1] "Homicide by misadventure is when "a man doth an act that is not unlawful, which without any "evil intent tendeth to a man's death."

"*Unlawful.*—If the act be unlawful it is murder. As if "A. meaning to steal a deer in the park of B., shooteth at the "deer and by the glance of the arrow killeth a boy that is hidden "in a bush, this is murder, for the act was unlawful, although "A. had no intent to hurt the boy and knew not of him. "But if B., the owner of the park, had shot at his own deer, "and without any ill intent had killed the boy by the glance "of his arrow, this had been homicide by misadventure and "no felony. So if one shoot at any wild fowl upon a tree, "and the arrow killeth any reasonable creature afar off with- "out any evil intent in him, this is *per infortunium*, for it was "not unlawful to shoot at the wild fowl; but if he had shot "at a cock or hen, or any tame fowl of another man's, and "the arrow by mischance had killed a man, this had been "murder, for the act was unlawful."

This astonishing doctrine has so far prevailed as to have been recognised as part of the law of England by many subsequent writers, although in a modified shape given to it long afterwards by Sir Michael Foster, who limits it to cases where the unlawful act amounts to felony. It has been repeated so often that I amongst others have not only [2] accepted it, though with regret, but have acted upon it.

[3] The case in which I did so was not one which set its possible cruelty in a specially strong light. I must, however, say upon careful search into Coke's authority that I believe the passage just quoted from the *Third Institute* to be entirely unwarranted by the authorities which he quotes. Coke refers in the margin to four such authorities, no one of which supports him. The first is the [4] passage in Bracton already observed upon, in which Bracton says, that if a man unintentionally kills another in doing an unlawful act, "hoc

[1] *3rd Institute*, p. 56. [2] See my *Digest*, art. 223, p. 144.

[3] At Lincoln, in the winter assize of 1880, two men and a woman were tried for murder before me. They had conspired together to rob a man. The girl brought him to the appointed place, the men threw him down and robbed him. He had a weak heart and died. The three prisoners were convicted of murder and sentenced to death, but were not executed.

[4] Vol. ii. p. 276, fo. 120*b*, which Coke misquotes as 136*b*.

CH. XXVI. "imputatur ei." He does not say that such an act amounted to murder, and it would not fall under the definition of murder which he gives, nor does he say that such an offence was in his day punishable with death. As I have already said, he says that the punishment of homicide in his day was various (pœna homicidii commissi facto variatur). As to the punishment given in this particular class of cases he is silent. The rest of Coke's authorities are three passages from the Year-books. The first is found not in the Year-books themselves but in FitzHerbert, *Corone*, 354, and is from the iter of Northampton in the third Edward III. This entry says that a jury found that a man killed a child by misadventure, having thrown a stone which fell on the child, whereupon the justices remanded him to wait for the king's pardon, and refused to let him out of prison on mainprise, but directed the sheriff to treat him humanely. This has obviously nothing to do with the matter. The first case referred to in the Year-books is 2 Hen. 4, 18. The only case I can find to which this can possibly refer is No. 6 in 2 Hen. 4, p. 18, which is a well-known authority as to the liability of a man whose fire burns the goods of another. In the course of the argument Thyrning says that if a man kills another by misadventure the slayer forfeits his goods and must get his pardon. The Year-book of 11 Hen. 7, p. 23*a*, which is the other authority cited, says that if two men fight with sword and buckler by consent and one kills the other it is felony, unless they fight by the king's command; also [1] that it is felony to kill a man by beating him, though without the intention of killing him. This, no doubt, says that to kill a man by an illegal act of personal violence is felony, though the act is not intended to kill, and it may be that the word "felony" means murder and not manslaughter, as the last remark seems to refer to instances of premeditated violence; but be this as it may, it is a long way from the proposition for which Coke cites it.

The other rule to which I referred is as to the effect of provocation in reducing what would otherwise be murder

[1] Such seems to be the meaning of the words, "Si on veut bāt aūt, et nemy "luy occit, unc̄ s'il luy occit p̄ s̄ batr̄, il sera dit felony car s̄ pm act ne fuit "soufferable."

to manslaughter. This rule is not to be found in terms either in Coke or in the earlier writers, but the law as to what was called homicide by chance medley came very near to it, and in fact must have included most of the cases of what we should describe as provocation. Coke mentions the absence of provocation for sudden killing as raising a presumption of malice prepense. But he does no more than mention it. In his reports (Part xii. fo. 87, vol. vi. p. 315, edition of 1826) he gives very shortly two cases of provocation, one of which certainly did not involve any falling out; but he does not seem to have seen the importance of these cases when he wrote the *Third Institute*, for he does not refer to them. The decisions seem to have been in 1612.

The established distinction between murder and manslaughter was, as I have already shown, that the one was killing with premeditated malice in the popular sense of the words, and the other killing upon a sudden falling out. It is obvious that this is a most imperfect account of the subject. As the whole doctrine of implied malice shows there were many kinds of homicide which could not properly be referred to either class, and the descriptions given by Coke, Lambard, and Staundforde, of manslaughter by chance medley, nearly all turn upon the details of fights with deadly weapons, which were no doubt the common occasions of death in the sixteenth and seventeenth centuries. The old law on this subject is adjusted at every point to a state of things in which men habitually carried deadly weapons and used them on very slight occasions. In substance it was to this effect: If two men quarrel and one attacks the other with a deadly weapon, it is the duty of the person so attacked to fly as far as it is physically possible for him to do so, whether he is in the right or in the wrong. If his enemy follows him up and tries to kill him, and if solely in order to avoid instant death he defends himself and kills his enemy, he is not to forfeit life and land like a felon, but he is to forfeit his goods and to purchase his pardon, and to be imprisoned till trial, no doubt because the presumption was that both parties were to blame in a quarrel. If the person attacked does not run away but resists, and in the fight either is killed, the offence is

CH. XXVI. manslaughter—a clergyable felony, punishable with forfeiture of goods, burning in the hand, and imprisonment for a year.

This again is an intelligible law in a time when the use of deadly weapons was common, but it is obviously not intended to apply to the forms of manslaughter, which are common in our own day. When the common mischief to be guarded against is the occurrence of set fights with deadly weapons, it is natural to lay down rules which treat each party as being pretty much on a level. When the mischief is the taking of inordinate vengeance for comparatively trifling injuries (as for instance, returning a box on the ear by a pistol-shot or a deadly stab) the question is what degree of provocation is to mitigate the legal denomination of the homicide caused by it. The contrast between the earlier and the later form of the law on this subject thus marks the gradual progress of a change in the national manners.

The next step in the history of the law of homicide is constituted by the elaborate examination of the subject [1] contained in Hale's *Pleas of the Crown*. It is no doubt a full account of the law as it then stood, but it has considerable defects. It disposes first of the subject of suicide, and then proceeds to "homicide and its several kinds, and first of "those considerations that are applicable as well to murder "as manslaughter." By this latter phrase Hale means to refer to such topics as those which I have already discussed under the heads of persons capable of being killed, and acts amounting to killing; but he goes incidentally into matters which belong to the general subject of excuse, such as the age of responsibility. Coming next to homicide in general he says that it is of "three kinds: (1) Purely voluntary, viz., "murder and manslaughter; (2) purely involuntary, as that "other kind of homicide *per infortunium;* (3) mixt, partly "voluntary and partly involuntary, or in a kind necessary; "and this again of two kinds, viz., inducing a forfeiture as "*se defendendo*, or not inducing a forfeiture as (1) in defence "of a man's house; (2) defence of his person against an

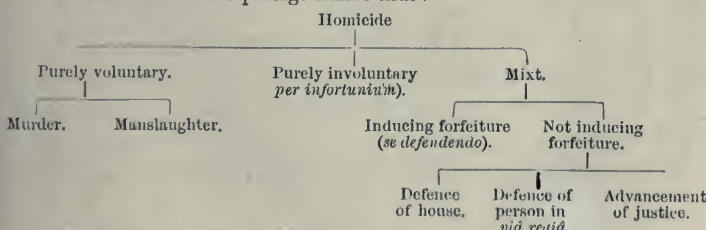
[1] Chaps. xxxiii.-xlii. both inclusive, vol. i. pp. 424-503.

"assault in *viâ regiâ;* (3) in advancement or execution "of justice." [1]

This distribution of the subject appears to me to be open to several fundamental objections. In the first place, it is difficult to see what Hale meant by the word voluntary, which lies at the root of the whole system. It cannot have meant intentional, because all the cases put under the awkward head of "mixed" are cases of intentional homicide; nor can it have meant "voluntary" in the strict sense of accompanied or caused by an act of the will, for that again would apply to nearly every imaginable case of homicide. It has indeed no distinct meaning. If it had had one the head of "mixed" could not have occurred, and Hale could not have described the execution of a criminal as a case of homicide partly voluntary and partly involuntary, done in the advancement of justice. Again, the expression "mixed" is altogether unmeaning. How can "voluntary" and "involuntary" be mixed? If to kill a man in self-defence is partly voluntary and partly involuntary the same may be said of every case in which there is a strong motive for killing a man, and then all cases of murder and most cases of manslaughter ought to be put under the head of "mixed." Besides, the distribution of the subject does not agree with the exposition itself. Manslaughter, according to the distribution of the subject, is "purely voluntary" homicide. But in the [2] exposition several cases are given of manslaughter by negligence under the head of "involuntary homicide."

The confusion indicated by these fundamental defects in Hale's plan of the subject makes itself felt in the heaviness, obscurity, and superabundant detail of his exposition of the

[1] In a tabular form the passage stands thus:—



[2] 1 Hale, *P. C.* p. 472.

CH. XXVI. law relating to it. After discussing the distribution of the subject he introduces a chapter (xxxiv.) "concerning commanding, counselling, or abetting of murder or manslaughter," although he admits that it would be "more proper under the "title of principal and accessories."

In his exposition of malice aforethought (chapters xxxvi., xxxvii.) he repeats Coke almost literally, though with the addition of a good many cases which are either unnoticed by Coke or were decided after his time. He takes no notice of the defects already pointed out in Coke's view of the subject, and seems to have been quite unconscious of them. Hale brings out, however, much more clearly and fully than Coke, the position of provocation in the general legal theory of homicide. Coke says that malice is implied in three cases, "first, in respect of the manner of the deed. As if one "killeth another without any provocation on the part of him "that was slain, the law implieth malice." This is all that he has to say on the subject. Hale [1] gives six illustrations, showing what did and what did not amount to such a provocation as Coke refers to in passing. They are the following:—

1. A. jostles B. to take the wall of him, or whips out of the track the horse on which B. is riding. This is provocation in A. (Lambe's case, 17 Chas. 1, 1641 or 1642.)

2. Insulting language is not such a provocation as will reduce murder to manslaughter, but "if A. gives indecent "language to B. and B. thereupon strikes A. but not mortally; "and then A. strikes B. and then B. kills A., that this is but "again manslaughter, for the second stroke made a new pro-"vocation," in the opinion of Hale himself and some others. ([2] Lord Morley's case, A.D. 1666.)

3. A. demands a debt of B. or serves him with a writ. This is no provocation.

4. A. makes faces at B. This is no provocation. (Brain's case, 42 Eliz., A.D. 1600.)

5. A. takes the wall of B. without jostling. This is no provocation.

6. A. and B. quarrelling, A. tells B. to pluck a pin out of

[1] 1 Hale, *P. C.* pp. 455-457.
[2] 6 *State Trials*, p. 769, and Kelyng, p. 85, ed. 1873 (53, old editions).

A.'s sleeve, which B. doth accordingly, and then A. strikes B., whereof he dies. This is no provocation (1) because A. consented; (2) because it appeared to be a deliberate artifice in A. to take occasion to kill B.

It is very remarkable that in treating of provocation Hale does not mention the provocation given by adultery. He does so, however, in [1] another part of his work, where he quotes, out of its proper place, a decision on the subject given in 1672. The [2] report is very short, and is in these words: "John Manning was indicted in Surrey for murder, "for the killing of a man, and upon not guilty pleaded, the "jury at the assizes found that the said Manning found the "person killed committing adultery with his wife, in the very "act, and flung a joint-stool at him, and with the same killed "him; and resolved by the whole court that this was but "manslaughter; and Manning had his clergy at the bar, and "was burned in the hand. The court directed the executioner "to burn him gently, because there could be no greater "provocation than this."

These cases give the most important part of our modern law on the subject of provocation, and are a curious instance of the gradual and casual manner in which a large part of the law came into existence.

First, *malice prepense* is half accidentally made the test of murder. It is then defined to mean a deliberate premeditated design to kill or hurt. This being found too narrow a definition, it is enlarged by the remark that killing without apparent provocation raises a presumption in fact of concealed motive. This being still too narrow, the presumption, in fact, becomes a presumption of law applying to all cases of unprovoked killing, even if, in fact, premeditation is disproved. This raises the question, what is such a provocation as will repel the legal presumption of malice arising from a sudden killing? This question the judges decide as cases occur.

The dates given show that the most important branches of the present law as to provocation are founded upon decisions

[1] 1 *P. C.* p. 486.

[2] Sir T. Raymond, p. 212.

CH. XXVI. given between 1642 and 1672, though one case on the subject was decided in 1600, and two others in 1612.

Under the second head of implied malice, which is when a minister of justice is killed in the execution of his office, Hale states a [1] string of cases, which, I think, may all be reduced to one principle. The mere execution by a legal officer of legal process in the manner authorised by law is no provocation to the person upon whom it is executed, and if he kills the officer, knowing, or having the means of knowing him to be an officer in the execution of his duty, he is guilty of murder. If, however, the officer exceeds his duty, or if the offender has not proper notice of his character, or of the nature of the act in which he is engaged, the arrest may be in the nature of a provocation, which will generally, though not always, reduce the offence to manslaughter. There are various detailed subordinate rules on this subject to which it would be foreign to my purpose to refer. This branch of the law is often treated in such a way as to include the whole law as to the use of force in executing legal process, and [2] Hale enters to a considerable extent into this subject, though in a fragmentary, disconnected way.

On manslaughter, in the modern sense of the word, [3] Hale has little to say, in addition to what he had already said, in distinguishing it from murder. When, however, he comes to killing *per infortunium* (chap. xxxix.), he points out cases in which the offence of manslaughter is committed by the neglect of proper precautions. [4] For instance, if a man lets fall a stone and kills another, after warning given, it is *infortunium.* If he gives no warning, it is manslaughter.

The subject of killing *per infortunium* is treated of by [5] Hale in an extremely confused manner, the confusion being caused by the circumstance that he had, as I have already shown, no distinct idea as to the principles of the subject. The greater part of the chapter relates as much to manslaughter as to killing *per infortunium.* I may, however, mention some points. In Hale's time it was still

[1] 1 Hale, *P. C.* pp. 456-465.
[2] *Ib.* pp. 457-465, 481, 489-496.
[3] See chap. xxxviii.
[4] P. 472.
[5] Chap. xxxix.

necessary for the jury to find the facts specially if they acquitted a man of murder or manslaughter, on the ground that he had killed *per infortunium* or *se defendendo,* and such a finding still involved forfeiture, besides which the court might give judgment upon it that the prisoner was guilty of manslaughter. Hale does not repeat Coke's monstrous and unwarranted assertion that all killing by an unlawful act is murder. He seems, on the contrary, to think that unless the act was intended to inflict bodily injury of some kind, the case would be manslaughter. It may be gathered from this chapter, though it is not laid down pointedly and emphatically, and with a due sense of the importance of the proposition, that to kill another, intentionally or not, by an act unlawful in itself, is always manslaughter.

After dealing with killing *per infortunium,* Hale [1] passes to killing *ex necessitate* or *se defendendo,* and here again he mentions a variety of cases of manslaughter, as, for instance, when a man upon a sudden fray does not fly far enough before he defends himself. [2] "The flight to gain the advan-"tage of *se defendendo* to the party killing must not be a "feigned flight, or a flight to gain advantage of breath, as "fighting cocks retire to gain advantage, but it must be a "flight from the danger as far as the party can." If not, the offence is manslaughter.

Hale enters more fully, I think, than any previous writer into the cases in which force may be used for the defence of the property or person of the person using the force, and of others; and here, again, any excess of force, or abuse of the power given by law makes the killing unlawful, and so man-slaughter. To take one instance out of many, he [3] says, "If "A., pretending a title to the goods of B., takes them away "from B. as a trespasser, B. may justify the beating of A.; "but if he beat him so that he dies, it is neither justifiable "nor within the privilege of *se defendendo,* but it is man-"slaughter."

After dwelling at length upon these topics, Hale concludes his discussion of the subject of homicide by a [4] chapter which has great constitutional interest. The subject is "taking away

[1] Chap. xl. [2] P. 483. [3] P. 485 [4] Chap. xlii.

CH. XXVI. "the life of man in the course of law or in execution of "justice." This chapter contains passages on a most curious subject, to which Hale for the first time gave prominence, though Coke to some extent refers to it. This is the criminal responsibility of persons who execute justice in an irregular way, or without lawful authority. The effect of what he says seems to be that it is not murder but "a great misprision" to pass capital sentences, and so to procure the execution of the persons on whom they are passed, in an irregular way; as, for instance, by acting under a commission of gaol delivery after it has been allowed to expire for want of due adjournment, or by giving judgment of death against a felon not within his jurisdiction by one who had the franchise of infangthef. He moreover quotes without dissent Coke's opinion that "the exercise of martial law in point of death "in time of peace is declared murder." This would imply that such a commission had no colour of law, and was a mere usurpation of power.

As to the forfeitures for killing *se defendendo* or *per infortunium*, [1] Hale repeats in substance, though with a good deal of additional detail, the statements of the earlier authors already noticed.

A few scattered passages in Hale show that the distinction which is now familiar between killing by an act intended or likely to do grievous injury, which is murder, and killing by an act intended or likely to do slight injury, which is manslaughter, was beginning to attract attention in his time. The most important of them [2] is as follows: "There was a "special verdict found at Newgate, viz., A. sitting drinking "in an alehouse, B., a woman, called him a son of a whore. "A. takes up a broomstaff and at a distance throws it at her, "which, hitting her upon the head, killed her. Whether this "were murder or manslaughter was the question in P. 26, "Car. 2" (Easter term, 1675); "it was propounded to all the "judges at Sergeants' Inn. Two questions were named. "1. Whether bare words, or words of this nature, would "amount to such a provocation as would extenuate the fact "into manslaughter. 2. Admitting it would not, in case

[1] Chap. xli.

[2] P. 456.

"there had been a striking with such an instrument as "necessarily would have caused death, as stabbing with a "knife, or pistolling, yet whether this striking that was so "improbable to cause death will not alter the case; the "judges were not unanimous in it; and in respect that the "consequence of a resolution on either side was great, it was "advised the king should be moved to pardon him, which was "accordingly done."

I have given a full account of Hale's treatise (for it is nothing less) on homicide because it constitutes the principal part of our existing law, although I think it ill-arranged, and although it has been to a considerable degree altered by subsequent legislation, and to some extent by subsequent text-writers. Its great defect is its total want of unity and simplicity. The three leading questions, as I have already shown, are these:—

1. What is homicide?

2. When is homicide punishable and when is it not punishable?

3. By what test are the kinds of homicide punishable in different ways to be distinguished?

Hale had, I think, glimpses of this view of the subject, but they were no more than glimpses, and he did not steadily adhere to any way of looking at the matter. One result of this is that in order to ascertain what he meant by manslaughter, it is necessary to look at every part of what he says on every branch of the subject. Homicide, which is nearly murder, but not quite, is manslaughter; and of such manslaughters there are four separate kinds, as there are four reasons for which an act which is nearly murder may fall short of it; homicide, which is nearly homicide *se defendendo,* but not quite, is manslaughter. A particular kind of homicide *per infortunium,* is manslaughter. There are thus seven different kinds of manslaughter besides what is called, by way of pre-eminence, manslaughter, which makes eight, and manslaughter under the Statute of Stabbing, which makes nine. It must, however, be admitted that if Hale had grasped the general principles of the subject and had preserved their relation to each other, he could hardly have

CH. XXVI. given a complete account of the law in a systematic shape without omitting to notice an immense number of technical details which were far more numerous then than they are at present.

In the interval between Hale and Foster ([1] who died in 1763, and published his *Discourses* in 1762) there were a variety of decisions on the law relating to homicide which are both more elaborate and better reported than those of earlier times. Three of these deserve special attention as they form definite and important points in the history of the law. They are the cases of [2] R. *v.* Plummer (1701), [3] R. *v.* Mawgridge (1707), and [4] R. *v.* Oneby (1727). The case of R. *v.* Plummer forms the foundation of a celebrated but unfortunate dictum of Sir M. Foster's. Each of the other two turns on the question of provocation, and incidentally on the true meaning of the expression malice aforethought.

Plummer, Harding, and six other persons were attempting illegally to export wool when they were stopped by Beverton and others lawfully authorised to prevent the exportation of wool. Upon this one of the six persons unknown fired a gun which shot Harding dead. The question was whether Plummer was guilty of murder. The facts were found by a special verdict which did not find anything more as to the firing of the gun than that the unknown person fired it. Holt, C. J., delivered a judgment, in which he laid down many rules as to the degrees in which joint wrong-doers are answerable for each other's acts, and gave reasons why, upon the findings of the jury, it could not be said that [5] Plummer was responsible for the act of the unknown person. He laid down, however, among other things, a doctrine as to acts done with a felonious intent which has maintained its place in the law. "The "design of doing any act makes it deliberate; and if the fact

[1] See preface to third edition, p. vii., and date of first edition, given in the preface to it reprinted in the third edition.

[2] Kelyng, p. 155 (old ed. 109).

[3] Kelyng, p. 166 (old editions, 119). The case is reported by Lord Holt and appended to Kelyng's reports. Kelyng died many years before his reports were published.

[4] Lord Raymond, 1485.

[5] As to these see my *Digest*, art. 38, pp. 23-24.

"be deliberate though no hurt to any person can be foreseen, "yet if the intent be felonious, and the fact designed, if com- "mitted, would be felony, and in pursuit thereof a person is "killed by accident, it will be murder in him and all his "accomplices. As for the purpose—divers persons design to "commit a burglary, and some of them are set to watch in a "lane to hinder any from going to the house to interrupt them "if any comes in their way, and those that are to keep watch "kill him, those that he sent to rob the house will be guilty "of that murder though they do not commit the burglary. "So if two men have a design to steal a hen and one shoots "at the hen for that purpose, and a man be killed, it is "murder in both, because the design was felonious. So is "Lord Coke (*Third Inst.* 56) surely to be understood with that "difference; but without this difference none of the books "quoted in the margin [1] do warrant that opinion nor, in- "deed, can I say that I find any to warrant my opinion, "but only the reason is submitted to the judgment of "those judges that may at any time hereafter have that "point judicially brought before them." It will be seen from this that the rule which appears to us so harsh as to be almost ridiculous, was originally suggested in an *obiter dictum* of Holt's by way of a mild and equitable restriction upon a harsher *obiter dictum* of Coke's, Holt's dictum resting avowedly on no authority, and Coke's professing to be founded on authorities which in fact do not support it.

Mawgridge's case, in a few words, was this: Cope and Mawgridge quarrelled in Cope's room, and Cope desired Mawgridge to leave it. Mawgridge thereupon threw a bottle of wine at Cope, and hit him on the head, and drew his sword. Cope rose and threw another bottle at Mawgridge. Mawgridge gave Cope a mortal wound with his sword. This was, upon a special verdict, adjudged to be murder, and Holt took occasion to deliver a judgment which contains a history of the law relating to murder, and an elaborate discussion as to the meaning of malice aforethought, and the nature of the provocation necessary to repel the presumption of it which arises from a sudden intentional killing. Of Holt's history

[1] Nor do they warrant it with "that difference" or at all.

CH. XXVI. of the offence I will say only that it notices more or less fully most of the matters which I have already detailed. After stating it, Holt proceeds to state what is the true meaning of malice as follows:—

"[1] Some have been led into mistake by not well consider- "ing what the passion of malice is; they have construed it "to be a rancour of mind lodged in the person killing for "some considerable time before the commission of the fact, "which is a mistake arising from not well distinguishing "between hatred and malice. Envy, hatred, and malice are "three distinct passions of the mind.

"1. Envy, properly, is a repining or being grieved at the "happiness and prosperity of another. '[2] Invidus alterius "rebus macrescit opimis.'

"2. Hatred, which is odium, is, as [3] Tully says, 'ira in- "veterata,' a rancour fixed and settled in the mind of one "towards another, which admits of several degrees. It may "arrive to so high a degree, and may carry a man so far as to "risk the hurt of him, though not to perpetrate it himself.

"3. Malice is a design formed of doing mischief to "another 'cum quis datâ opera male agit.' He that designs "and uses the means to do ill is malicious. [4] 2 *Inst.* 42,—*He* "*that doth a cruel act voluntarily doth it of malice prepensed.*" He then quotes Coke on the statute of 5 Hen. 4, c. 5, as to cutting out tongues and putting out eyes. I think that the words italicised define malice aforethought shortly, correctly, and happily. If the words were "cruel, or cruelly reckless," I think the definition would be as complete as so short a definition can be. If fully understood and applied I believe it would practically solve nearly all questions as to the distinction between murder and manslaughter, for on the one hand it shows that the words "aforethought," "prepense," "deliberate," in the established definition have no real meaning, inasmuch as the state of mind which causes the act must of necessity precede it. On the other, it

[1] Kelyng, p. 174.

[2] Horat. *Epist.* i. ii. 57.

[3] Quoted in Facciolati as in pro Balbo. 13, but the reference is wrong.

[4] This reference is wrong. I suppose *Third Inst.* 62, which relates to the statute 5 Hen. 4, c. 5, is intended.

would exclude the monstrous doctrine which Coke put forward and which Hale and Foster (in a slightly mitigated form) repeat, that malice is always implied from an unlawful act which occasions death.

Having discussed the subject of malice, Holt proceeds to discuss the question of provocation. [1] He considers, I think, every, or nearly every, case then decided, and brings out a result which is still law, though in some few particulars it might, I think, require modification. In particular his [2] view as to the provocation supposed to be given to the world at large by a wrongful arrest was dissented from by [3] Foster, who seems to me to refute Holt's theory fully.

This part of the judgment shows that at the time when it was delivered, manslaughter was more frequently distinguished from murder by the degree of provocation which the offender had received than by the circumstance that it was an incident in a fray upon a sudden falling out. The superficial view that when one man kills another it must be either upon waylaying and premeditation or upon a sudden falling out, has been superseded by the broader and deeper view that the moral character of homicide must be judged of principally by the extent to which the circumstances of the case show, on the one hand, brutal ferocity, whether called into action suddenly or otherwise, or on the other, inability to control natural anger excited by a serious cause. As to Mawgridge himself he was most justly held to have committed murder. [4] "This miscreant was in the actual "violation of all the laws of hospitality." On being asked to leave a room in which he was a guest, he threw a bottle at the head of his host, and followed up this murderous act by a deadly stab with his sword. The fact that after the first bottle was thrown Cope threw another was justly regarded as immaterial to Mawgridge's guilt as it was a [5] justifiable act of self-defence.

[1] Kelyng, pp. 178-186.

[2] See pp. 185-186.

[3] Pp. 315-318. See Lord Blackburn's letter on the case of R. *v.* Allen, printed in my *Digest*, pp. 372-374. Practically this letter may be regarded as equivalent to a judgment.

[4] Holt's words, p. 182.

[5] The throwing of the bottle by Captain Cope was justifiable and lawful, p. 176.

CH. XXVI.

The decision in Mawgridge's case seems to have been regarded as an extension of the law, for in the argument in Oneby's case the counsel said that it "carried murder further "than it had ever been carried before." It was, however, followed and possibly carried a little further still in the [1] case of Oneby, a major in the army, who appears to have been much such another brutal ruffian as Mawgridge. Sitting in a tavern with one Gower he took extreme offence at a harmless joke (if such it could be called) of Gower, who offered to stake half-pence when the party were playing for half-crowns. After a few words on this trifle Oneby threw a bottle at the head of Gower with great force, and Gower "tossed a glass "or candlestick at Oneby." Neither hit the other. They all sat together for an hour. Gower offered to be reconciled, but Oneby said, "No, damn you, I'll have your blood." Gower and the rest after a time left the room. Oneby remained, and called Gower back, saying, "Young man, I have "something to say to you." Gower returned. A clashing of swords was heard. Gower was mortally wounded, and Oneby was wounded slightly in three places. Gower, "being "asked upon his death-bed whether he had received his "wounds in a manner among swordsmen called fair, said 'I "'believe I did.'"

This also was most properly held to be murder, Oneby's whole conduct having shown a bloodthirsty determination to kill or desperately injure Gower. In giving judgment upon it Lord Raymond entered at great length into the law regarding malice and provocation. His language was certainly not so happy as Holt's, but was much to the same effect. [2] "In common acceptation malice is took to be a settled anger "(which requires some length of time) in one person against "another, and a desire of revenge. But in the legal acceptation [3] it imports a wickedness which includes a circumstance "attending an act that cuts off all excuse." He instances the phrase "mute of malice," which he says means not

[1] Lord Raymond, 1484; reported also in Strange and the *State Trials*.
[2] P. 1487.
[3] I do not know what this can possibly mean, except that malice means wickedness unexcused.

"revenge, but "refusing to submit to the course of justice "wickedly," *i.e.*, without any manner of excuse, or out of "frowardness of mind."

He proceeds to show that the whole conduct of Oneby showed brutal wickedness. [1] Oneby, who was an habitual duellist, was greatly surprised at this decision and committed suicide in order to avoid being hanged.

Probably both Mawgridge and he would have escaped under the law as it stood in Coke's time, as the cases might have been regarded as frays upon a sudden falling out. I know of no better definition of malice aforethought than the one given in Mawgridge's case, and I have frequently used it in directing juries.

I come now to the last writer on the subject whose views it is necessary to refer to at any length. This is Sir Michael Foster, whose report and discourses on different branches of the crown law were published in 1762, though they had been written for a considerable length of time. His discourse on homicide, though not in form as systematic as the works of Hale and the predecessors of Coke, is arranged with admirable perspicuity, deals with all the leading branches of the subject, and may, I think, be regarded as having completely settled all the fundamental questions relating to it, though there have been a great number of subsequent decisions. It begins thus:—

"I shall consider the law touching homicide under the "following distinctions:—

"It is either occasioned by accident, which human "prudence could not foresee or prevent,

"Or it is founded in justice,

"Or in necessity,

"Or it is owing to a sudden transport of passion, which "through the benignity of the law is imputed to human "infirmity;

[1] The report in 17 *State Trials*, p. 36, says that "as the prosecutor had "taken no steps towards bringing on the hearing of the special verdict, he" (Oneby) "grew pretty confident that it would be determined manslaughter, "and feed counsel to move the Court of King's Bench for a *concilium* to be "made for arguing the special verdict." As to Oneby's suicide, see pp. 55-56. Mawgridge escaped to Holland, where he stayed for two years, but was retaken and brought over to England, where he was hanged April 28, 1708.—*Ib.* p. 72.

Ch. XXVI.

"Or it is founded in malice."

He shortly explains the sense in which he understands malice aforethought as meaning that [1] "the fact hath been "attended with such circumstances as are the ordinary "symptoms of a wicked, depraved, malignant spirit." [2] He adds, "Most, if not all the cases, which in our books are "ranged under the head of implied malice, will, if examined, "be found to turn upon this single point, that the fact has "been attended with such circumstances as carry in them the "plain indications of a heart regardless of social duty and "fatally bent upon mischief." The whole treatise is an attempt to work out this general idea, and to make the law as it was correspond as closely as possible to the moral sentiments to which, in Foster's opinion, it ought to conform.

Foster severely scrutinizes, and sets himself to explain away every harsh decision and every irrational rule, and so does all he can to make the law amiable and equitable. He frequently speaks in cordial praise of the system which he administered, but he had far too much historical knowledge and far too strong a sense of the gradual development of the system to give it blind or unqualified approbation. In reference to benefit of clergy he observes, [3] "Whenever I "speak of the benignity of the law, and its condescension "to human infirmity in the case of manslaughter, I would "be always understood to speak of the law in its present "state."

I think that to a very considerable extent he effected his object, though in some particular instances he failed to do so, as I will now proceed to show. I must observe that a large proportion of the matters dealt with by Foster have been already noticed by me in their place; and without recurring to them I shall notice those points only in which he either recorded or effected alterations in the law.

With regard to accidental, or, as it might more properly be called, unintentional homicide, Foster distinguishes, as did all his predecessors from Bracton downwards, between unintentional homicide in a lawful and in an unlawful act.

[1] Foster, p. 256. [2] *Ib.* p. 257. [3] *Ib.* p. 305.

Coke, it must be remembered, had laid it down in broad and unqualified terms that unintentional homicide in an unlawful act is murder—a monstrous doctrine, and, as I have shown, one in which Coke's assertion rested upon little or no authority. To some extent it had, as has already been shown, been modified by Hale and Holt, and Foster repeats Hale in a more definite, but as it seems to me an entirely arbitrary form. Where a person unintentionally kills another by an unlawful act : [1] "The case will amount to felony, either murder or man-"slaughter as circumstances may vary the nature of it. If it "be done in the prosecution of a felonious intention it will be "murder, but if the intent went no further than to commit "a bare trespass manslaughter, though I confess Lord Coke "(*ThirdInstitute*, 56) seemeth to think otherwise. . . . I do "not intend to enter into a long detail of cases falling "within this rule. . . . I will content myself with a few "plain instances. . . . A. shooteth at the poultry of B. and "by accident killeth a man; if his intention was to steal the "poultry, which must be collected from circumstances, it will "be murder by reason of the felonious intent; but if it was "done wantonly and without that intention, it will be barely "manslaughter." Cruel and, indeed, monstrous as such an illustration may appear to us, it is put forward by Foster as a mitigation of the views of Coke, and such no doubt it is. It certainly is less objectionable to say that unintentional homicide committed in the prosecution of a felonious design is murder, than to say that unintentional homicide committed by any unlawful act is murder. Foster's own illustration, however, shows clearly that the one rule is less bad than the other, principally because it is narrower. The only authority quoted for it by Foster is the dictum, or rather suggestion of Holt, in R. *v.* Plummer already referred to.

This is, I think, the only blot upon Foster's treatise on the subject, and in extenuation it must not be forgotten that for fifty-four years after Foster's death all felonies except petty larcency were in theory capital crimes; so that to treat as a capital offence the act of shooting at a fowl with intent to steal and accidentally killing a man would not appear to

[1] Foster, p. 258.

CH. XXVI. Foster in the same light in which it appears to us. The rest of the chapter goes through many cases in which death may be caused unintentionally by unlawful personal violence, and establishes the principle which has ever since been accepted, that, on the one hand, murder is divided from manslaughter by the presence, in the infliction of the injury, of "the heart "regardless of social duty and deliberately bent upon mischief," and on the other hand, that manslaughter is divided from killing *per infortunium* by the presence of a degree of carelessness sufficiently great to be described as culpable. The result of what he says may, I think, be thrown into the following proposition :—

Death caused by the unintentional infliction of personal injury is *per infortunium* if the act done was lawful and was done with due caution, or was accompanied only by slight negligence. If it was accompanied by culpable negligence, the act is manslaughter. If it was accompanied by circumstances showing a heart regardless of social duty and fatally bent upon mischief, or if the intent is felonious, it is murder.

Foster's views on *Homicide founded in Justice*, and on *Homicide founded in Necessity*, add little to what had been said by others, but he [1] goes into some curious particulars upon the verdict of the jury in cases of justifiable and excusable homicide. As I have already said, the ancient law was that in cases where homicide was proved to be strictly justifiable the jury might acquit, but that in cases of homicide *per infortunium* and *se defendendo* they were to give a special verdict, and the prisoner was to be pardoned as of course, the reason being that the party forfeited his goods at common law. Foster expresses considerable doubt as to this, and (as I have already said) he certainly points out several mistakes upon the subject made by early writers, but I do not think he shows—I am not sure that he meant to show—that the practice of forfeiture did not in fact exist for a long period of time. However this may be, [2] he incidentally uses language which implies that in his time these special verdicts had fallen into disuse, the judges having "taken general verdicts of acquittal in plain cases of death

[1] Foster, chap. iv. p. 279. [2] *Ib.* pp. 288-289.

"*per infortunium*" and also it seems in cases of *se defendendo*. He adds this remarkable observation: "And if it deserveth "the name of a deviation it is far short of what is constantly "practised at an Admiralty sessions under the 28 Hen. 8, "with regard to offences not ousted of clergy by particular "statutes which, had they been committed on land, would have "been entitled to clergy. In these cases the jury is constantly "directed to acquit the prisoner; because the marine law "doth not allow of clergy in any case, and therefore in an "indictment for murder on the high sea, if the fact cometh "out upon evidence to be no more than manslaughter; "supposing it to have been committed at land, the prisoner is "constantly acquitted."

The law upon this subject may thus be considered as having fallen into desuetude in the course of the eighteenth century. It was finally abolished in 1828 by 9 Geo. 4, c. 31, s. 10, which provides that no punishment or forfeiture shall be incurred by any person who shall kill another by misfortune, or in his own defence, or in any other manner without felony. This section was repealed and re-enacted by 24 & 25 Vic. c. 100, s. 7.

One incident of the old law as to death *per infortunium* was that the thing by which death was caused was forfeited to the king as a deodand. The law of deodands is as old as Bracton,[1] who says that upon an inquest on persons killed *per infortunium* the boats from which they were drowned and other things which caused their death are to be deodands for the king, unless the accident happened in salt water "nec "sunt deodanda ex infortunio in mare." [2] Hale gives a minute account of the law of deodands in his time. The law seems to have been framed under a sort of impression that the thing which caused deaths ought to be punished; for, as a general rule, a thing was not a deodand unless it could be said "movere "ad mortem." A beast which killed a man, a tree which fell upon him, the wheel of a water-mill under which he was carried and which killed him, were deodands. If a man was thrown from his horse against a trunk, the horse was a deodand but not the trunk. It seemed to be the better

[1] Bracton, ii. 284-286.

[2] Hale, *P. C.* i. 419-424.

CH. XXVI. opinion that, if a man watering his horse fell and was drowned, the horse was not a deodand unless he had thrown his master. If a man "getting up a cart by the wheel to gather plums" fell and was killed, the wheel was a deodand; but if a boy under fourteen fell from a cart or horse, it was no deodand, "because he was not of discretion to look for himself," and so the cart or horse could not be said to be to blame. If, however, a cart ran over a boy, or a tree fell upon him, or a bull gored him, it was a deodand, because (apparently) it went out of its way to kill him. Hale, however, says that in such a case it shall be imputed to the neglect of the keeper of the goods,—a rationalizing explanation. I suppose that deodands were not in use at sea, because the local customs of England did not extend to the high seas. Deodands retained their legal existence till 1846, when they were abolished by 9 & 10 Vic. c. 62.

I do not think that any writer subsequent to Foster has added much to the subject of the law of homicide. [1] In Blackstone's *Commentaries* there is a chapter on homicide which has all the merits peculiar to its author, both in style and arrangement, but it adds nothing to what had been said by earlier authors. From Blackstone to our own days the matter has been handled exclusively by writers of books of practice—East, Russell, Archbold, Roscoe, and some others—who repeat each other and abstract an immense number of reported cases, but add practically nothing to the history or to the theory of the subject. One change only has been made by statute in the law on the subject, which, though of the greatest importance, has passed almost unnoticed. I refer to the act which altered the punishment of manslaughter. Manslaughter was originally a clergyable felony, punishable under the statutes already referred to with burning in the hand and imprisonment for not exceeding a year. That this punishment should have been considered adequate for the more aggravated class of manslaughter is surprising, as, for instance, for cases in which a slight blow was revenged by a deadly stab, or in which life was taken in a mutual combat conducted with circumstances of extreme brutality, and

[1] Blackstone, iv. 176, ch. xiv.

probably the consciousness of this may have been connected with the harsh constructions which were put by the judges on the phrase "malice aforethought." It may be hard to say that a man who kills another by means neither likely nor intended to kill in an attempt to commit a robbery, is to be regarded as a murderer, but it must be owned that for such an offence burning in the hand and a year's imprisonment would be a very inadequate sentence. The law, however, remained unaltered upon this point till 1822, when, by 3 Geo. 4, c. 38, manslaughter was made punishable by transportation for life or for any less term, or by imprisonment with or without hard labour for three years as a maximum, or by fine. This enactment was repealed and re-enacted by 9 Geo. 4, c. 31, s. 9, which was similarly dealt with by 24 & 25 Vic. c. 100, s. 5, which is still in force. The maximum term of imprisonment is, however, lowered to two years.

Of the modern decisions connected with the law of homicide, I shall, upon the present occasion, say only that the principles of the law are all stated more or less distinctly in the authorities which I have examined in the historical review just concluded. The numerous decisions of more modern times consist almost entirely of illustrations of them and of cases in which they have been applied to combinations of facts marked by some special peculiarity. I have reduced the law upon the subject to the form of propositions, which will be found in [1] my *Digest*, in which also will be found an account of the vast mass of cases collected in *Russell on Crimes*, showing how all of them find their place under the various propositions into which I have condensed the law.

The Criminal Code Commission of 1878-79 closely follows the arrangement of the subject contained in my *Digest*, and proposes a definition of murder and manslaughter which substantially corresponds with the one contained in the *Digest*, those parts only of the definition being omitted in which the present law is founded upon the *dicta* of Holt and Foster, intended to mitigate the rigour of Coke's unauthorised statement that unintentional killing by an

[1] Chaps. xxiii. xxiv., p. 138-155, and see particularly note xiii. and xiv. pp. 350-366.

CH. XXVI. unlawful act is murder. I cannot express my view of the actual state of the common law and of the alterations which it requires better than by placing side by side the statement of it contained in my *Digest*, and the articles which were proposed to be enacted by the Criminal Code Commission, and by making some observations on the points of agreement and difference between them.

Both my *Digest* and the Criminal Code begin by affixing a definite meaning to the expression "Unlawful Homicide" by specifying the cases in which homicide is not an offence punishable by law. In this preliminary matter little, I think, need be said, as the present law seems fairly satisfactory. The following extracts state the common law definition of murder and manslaughter as it now is, and the provisions which the Criminal Code Commissioners proposed to substitute for it:—

Digest, Art. 228.

"Manslaughter is unlawful homicide without malice aforethought.

"Murder is unlawful homicide with malice aforethought.

"Malice aforethought means any one or more of the following states of mind preceding or co-existing with the act or omission by which death is caused, and it may exist where that act is unpremeditated.

"(*a*) An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not.

"(*b*) Knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.

"(*c*) An intent to commit any felony whatever.

"(*d*) An intent to oppose by force any officer of justice on his way to or returning from the execution of the duty of arresting, keeping in custody, or imprisoning any person whom he is lawfully entitled to arrest, keep in custody, or imprison, or the duty of keeping the peace, or dispersing an unlawful

Draft Code.

"174. Culpable homicide is murder in each of the following cases:

"(*a*) If the offender means to cause the death of the person killed.

"(*b*) If the offender means to cause to the person killed any bodily injury which is known to the offender to be likely to cause death, and if the offender, whether he does or does not mean to cause death, is reckless whether death ensues or not.

"(*c*) If the offender means to cause death, or such bodily injury as aforesaid, to one person, so that if that person be killed the offender would be guilty of murder, and by accident or mistake the offender kills another person, though he does not mean to hurt the person killed.

"(*d*) If the offender, for any unlawful object, does an act which he knows or ought to have known to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting any one.

"175. Culpable homicide is also murder in each of the following cases, whether the offender means or not death to ensue, or knows or not that death is likely to ensue:

Digest, Art. 228.

"assembly, provided that the "offender has notice that the person "killed is such an officer so em- "ployed.

"The expression 'officer of jus- "tice' in this clause includes every "person who has a legal right to do "any of the acts mentioned, whether "he is an officer or a private person.

"Notice may be given, either by "words, by the production of a war- "rant or other legal authority, by the "known official character of the per- "son killed, or by the circumstances "of the case.

"This article is subject to the pro- "visions contained in Articles 214-226 "both inclusive, as to the effect of "provocation."

Draft Code.

"(*a*) If he means to inflict grievous "bodily injury for the purpose of "facilitating the commission of any "of the offences hereinafter men- "tioned, or the flight of the offender "upon the commission or attempted "commission thereof, and death en- "sues from his violence.

"(*b*) If he administers any stupe- "fying thing for either of the pur- "poses aforesaid, and death ensues "from the effect thereof.

"(*c*) If he by any means wilfully "stops the breath of any person for "either of the purposes aforesaid, "and death ensues from such stopping "of the breath.

"The following are the offences "hereinbefore in this section referred "to: piracy, and offences deemed to "be piracy; escape or rescue from "prison or lawful custody; resisting "lawful apprehension; murder; "rape; forcible abduction; robbery; "burglary; arson.

"177. Culpable homicide not "amounting to murder is man- "slaughter."

The following extracts state the common law as it now stands as to provocation, and the alterations which the Commissioners proposed to make in it:—

Digest, Arts. 224-226, pp. 147-150.

"224. Homicide, which would "otherwise be murder, is not murder "but manslaughter if the act by "which death is caused is done in the "heat of passion caused by provoca- "tion as hereinafter defined, unless "the provocation was sought or "voluntarily provoked by the offender "as an excuse for killing or doing "bodily harm. The following acts "may, subject to the provisions con- "tained in Article 225, amount to "provocation:—

"(*a*) An assault and battery of such "a nature as to inflict actual bodily "harm or great insult is a provocation "to the person assaulted.

"(*b*) If two persons quarrel and "fight upon equal terms, and upon the "spot, whether with deadly weapons "or otherwise, each gives provocation

Draft Code.

"176. *Provocation.* — Culpable "homicide, which would otherwise "be murder, may be reduced to "manslaughter if the person who "causes death does so in the heat of "passion caused by sudden provoca- "tion.

"Any wrongful act or insult of "such a nature as to be sufficient to "deprive an ordinary person of the "power of self-control may be provo- "cation, if the offender acts upon it "on the sudden and before there has "been time for his passion to cool.

"Whether any particular wrongful "act or insult, whatever may be its "nature, amounts to provocation, and "whether the person provoked was "actually deprived of the power of "self-control by the provocation "which he received, shall be ques-

CH. XXVI.

Digest, Arts. 224-226, pp. 147-150.	*Draft Code.*
"to the other, whichever is right in "the quarrel and whichever strikes "the first blow. "(*c*) An unlawful imprisonment is "a provocation to the person impri- "soned, but not to the bystanders, "though an unlawful imprisonment "may amount to such a breach of the "peace as to entitle a bystander to "prevent it by the use of force suf- "ficient for that purpose. An arrest "made by officers of justice whose "character as such is known, but "who are acting under a warrant so "irregular as to make the arrest illegal, "is provocation to the person illegally "arrested, but not to the bystanders.	"tions of fact: Provided that no "one shall be deemed to give "provocation to another only by "doing that which he had a legal "right to do, or by doing anything "which the offender incited him to "do in order to provide the offender "with an excuse for killing or doing "bodily harm to any person: "Provided also, that an arrest shall "not necessarily reduce the offence "from murder to manslaughter be- "cause the arrest was illegal, but if "the illegality was known to the "offender it may be evidence of pro- "vocation."

"(*d*) The sight of the act of adultery committed with his wife is provocation "to the husband of the adulteress on the part both of the adulterer and of the "adulteress.

"(*e*) The sight of the act of sodomy committed on a man's son is provocation "to the father on the part of the person committing the offence.

"(*f*) Neither words, nor gestures, nor injuries to property, nor breaches of "contract, amount to provocation within this article, except (perhaps) words "expressing an intention to inflict actual bodily injury, accompanied by some "act which shows that such injury is intended; but words used at the time "of an assault—slight in itself—may be taken into account in estimating the "degree of provocation given by a blow.

"(*g*) The employment of lawful force against the person of another is not a "provocation to the person against whom it is employed.

"225. Provocation does not extenuate the guilt of homicide unless the "person provoked is, at the time when he does the act, deprived of the power "of self-control by the provocation which he has received, and in deciding the "question whether this was or was not the case regard must be had to the nature "of the act by which the offender causes death, to the time which elapsed "between the provocation and the act which caused death, to the offender's "conduct during the interval, and to all other circumstances tending to show "the state of his mind.

"226. Provocation to a person by an actual assault, or by a mutual combat, "or by a false imprisonment, is, in some cases, provocation to those who are "with that person at the time, and to his friends who, in the case of a mutual "combat, take part in the fight for his defence. But it is uncertain how far "this principle extends."

The following points relating to these two definitions of murder are observable:—

Each assumes the preliminary definition of culpable or unlawful homicide. Each recognises murder as a species of unlawful homicide, distinguished from manslaughter by the existence in the offender at the time of the offence of a given state of mind. My definition of course contains the expression "malice aforethought." It would be incorrect if it did not do so. I have done my best, however, to give the equivalent of that expression by a statement of the various

states of mind which have been held, by the various authorities referred to, to constitute it. It would, however, be on all accounts far better to substitute, as the Draft Code does, a definite enumeration of the states of mind intended to be taken as constituent elements of murder for a phrase which is never used except to mislead or to be explained away.

A comparison between my *Digest*, 223 (*a*) and (*b*), and the Draft Code, 174 (*a*), (*b*), (*c*) and (*d*), will show that the two exactly correspond, though the language of the Code is less compressed than that of the *Digest*, dealing separately with the cases in which an offender kills the person whom he means to kill or hurt, and the cases in which he kills some other person. This difference is mere matter of style. So far both the *Digest* and the Draft Code state, in language which I think it is impossible to misunderstand, the legal meaning of the phrase express malice.

My article 223 (*c*) and (*d*), corresponds to s. 175 of the Draft Code. This part of the *Digest* gives the meaning of the phrase implied malice, and the corresponding article of the Code shows the extent to which the commissioners proposed to contract the definition. It will be observed at once that the *Digest*, which represents the existing law, is here much wider, and so much more severe, than the enactments proposed by the Commission. For instance, the present law is, at all events, generally supposed to make it murder to kill a man accidentally by shooting at a domestic fowl with intent to steal it, or to kill a man unintentionally by violence used in order to rob him, which violence was neither likely nor intended to kill. Under the Draft Code such offences would be manslaughter. I am not sure that s. 175 (*a*) of the Draft Code adds anything of importance to the provisions of s. 174. Clauses (*b*) and (*c*) of s. 175 were introduced on account of the extreme danger involved in the use of stupefying drugs, or attempts to prevent outcries in order to commit certain crimes. The offences defined would undoubtedly be murder by the existing law. Some years ago, at Fordingbridge, a man attempted to ravish a young woman, and pushed her shawl into her mouth to prevent her from crying out. She

CH. XXVI. died, and he was hanged, though it is obvious that he could not have intended to kill her, as by doing so he frustrated his own object. I am not sure that it is worth while to provide by express words for such cases, as I think that a jury would feel no difficulty in finding that in such a case as the Fordingbridge murder the offender either knew, or ought to have known, that his act was likely to cause death, in which case it would be murder under 174 (*c*). I think, in short, that s. 174 reproduces in plain language that part of the existing law which would be in harmony with the common standard of moral feeling: it describes in perfectly unambiguous language all the worst and most dangerous cases of homicide.

As I have already stated, I am strongly of opinion that capital punishments should be retained, and that they should be extended to some cases in which offenders are not at present liable to them; but I am also of opinion that no definition which can ever be framed will include all murders for which the offender ought to be put to death, and exclude all those for which secondary punishment would be sufficient. The most careful definition will cover crimes involving many different degrees both of moral guilt and of public danger; moreover, those murders which involve the greatest public danger may involve far less moral guilt than others which involve little public danger. It must also be remembered that the definition of murder is, and must necessarily be, complicated. There must be an act causing death; an intention accompanying the act, and death resulting as a fact. The motive prompting the act ought not, I think, to be embodied in the definition, because the attempt to do so must infallibly lead to inextricable confusion, and probably to legal fictions like those from which our own law has not yet worked itself clear, but it must always affect the moral guilt of the offence itself. It is impossible not to recognise a difference in guilt between the man who deliberately poisons another in order to rob him and a man who shoots another in a duel in which he risks his own life upon equal terms, and to which the person killed has provoked him by cruel injuries, for which the law gives no remedy. Each, however, kills intentionally and unlawfully.

These considerations appear to me to show that murder, however accurately defined, must always admit of degrees of guilt; and it seems to me to follow that some discretion in regard to punishment ought also to be provided in this as in nearly every case. The discretion does, in fact, exist at present, and is exercised by the Home Secretary, though upon every conviction for murder sentence of death is passed by the judge. For many obvious reasons I think it ought to be exercised by the judge.

It is a matter of considerable difficulty to enumerate all the circumstances which affect the guilt of such an offence as murder; but after much consideration and observation I have made a collection of such cases which I think is nearly, it is difficult to say that it would be altogether, complete. They are as follows:—

1. The absence of a positive intention to kill, or to inflict an injury known to the offender to be likely to kill, is perhaps the commonest case for the commutation of a sentence under the existing law. The instance to which I have already referred, of three persons who combined to rob a man, and who killed him by violence which was fatal because he had disease of the heart, but would not have been fatal if he had been in ordinary health, is a good illustration. If murder were redefined as suggested in the Code, these cases would no longer fall within the definition of murder.

2. Cases in which the offender has received provocation from the deceased not falling within the line laid down by the existing law on the subject. A man who kills his wife because she boasts of her unfaithfulness to him, and expresses her determination to continue it, is felt to be much in the same position as a man who revenges a blow by a pistol-shot. Cases of this kind would be met by the alterations proposed to be made by the Code in the law relating to provocation.

3. There are many cases in which a man's mind is more or less affected by disease, but in which it cannot be said that he is entitled to be altogether acquitted on the ground of insanity. I have given my reasons at length elsewhere for thinking that in these cases insanity should operate, if at

CH. XXVI. all, in mitigation of punishment, and that a verdict of "Guilty, "but his power of self-control was affected by insanity," should be permitted. Many cases of child-murder would come under this category.

4. Cases in which the deceased person consented to his own death; as, for instance, A. and B. agree to poison themselves together. A. provides poison, of which both drink; B. dies, and A. recovers.

5. Cases in which the motives of the offender are compassion, despair, or the like. A mother, deserted by her husband and unable to provide for her child, drowns it. A physician administers deadly poison to a person dying of hydrophobia, in order to shorten his agonies.

6. Cases in which a woman kills her new-born child under the distress of mind and fear of shame caused by child-birth. I believe that no one has been executed for such an offence for about forty years.

7. Cases where the offender is extremely young. I have known several cases of deliberate murders by children; but I do not think that any one would, as a rule, be hanged in these days at a very early age.

If murder were redefined in the manner suggested by the Code, and if the judge had power to pass a sentence of penal servitude, say for not less than twenty years, I think the law would be satisfactory, and might be strictly carried out. I would on no account leave to the jury either the question whether the circumstances of mitigation existed, except in the case of insanity, or the question whether the sentence should be mitigated. There is no subject on which the impression of a knot of unknown and irresponsible persons, who have to decide at a moment's notice without reflection, is less to be trusted than the question whether or not the punishment of death should be inflicted in a given case.

If the judge had the power of mitigating the sentence, I think his power would hardly ever be abused in the direction of over severity, and if it was it might be corrected by the Home Secretary, as at present. On the other hand, a judge would probably not be more likely to err from over leniency than the Secretary of State. From long experience I can

affirm that the cases in which capital punishment will, and those in which it will not, be inflicted can be distinguished almost at a glance by an experienced person, and I have little doubt that the effect of such a limited discretion as I suggest would be that the sentence of death would rarely be passed without being carried out, and this would be highly desirable on grounds too obvious to mention.

As an authority in favour of this view, I may observe that the Capital Punishment Commissioners of 1866 unanimously recommended as follows:—"There is one point upon which "the witnesses whom we have examined are almost unani-"mous, viz., that the power of directing sentence of death to "be recorded should be restored to the judges." The effect of this would be to give the judges the power of directing that sentence of death should not be carried out. Obviously it would be better, if they are to have this power, that they should also have the power of passing sentence of penal servitude. I may add that, by the Indian Penal Code, the sentence for murder may be transportation for life.

Upon the question of provocation, I think that a comparison of the statement of the law in the *Digest*, and the proposed enactment of the *Code* speaks for itself. It would be a great improvement in the law to have a clear, definite rule upon the subject, for there is at present nothing which can properly be called by that name. The whole law of provocation rests, as I have shown, upon an avowed fiction—the fiction of implied malice. Malice is implied when a man suddenly kills another without provocation. What is the provocation which will rebut the legal presumption of malice in cases of sudden killing? The answer is to be collected from a long string of cases, most of them decided by single judges; though some in early times, and especially in the early part of the sixteenth century, were decided by the full court upon special verdicts. The result is given in my *Digest*, and though full of valuable materials for a more general rule, it is as incomplete as it is elaborate.

I now proceed to compare the French and German law upon this subject with our own.

The French law is by far the more elaborate of the two,

CH. XXVI. and is contained in the following articles of the *Code Pénal*:—

"295. L'homicide commis volontairement est qualifié "meurtre.

"296. Tout meurtre commis avec prémeditation, ou de "guet-apens est qualifié assassinat.

"297. La prémeditation consiste dans le dessein formé "avant l'action, d'attenter à la personne d'un individu deter- "miné, ou même de celui qui sera trouvé ou rencontré, quand "même ce dessein serait dependant de quelque circonstance ou "de quelque condition.

"298. Le guet-apens consiste à attendre plus ou moins de "temps dans un ou divers lieux un individu, soit pour lui "donner la mort, soit pour exercer sur lui des actes de "violence.

"299. Est qualifié parricide le meurtre des pères ou mères "légitimes naturels ou adoptifs ou de tout autre ascendant "légitime.

"300. Est qualifié infanticide le meurtre d'un enfant "nouveau-né.

"301. Est qualifié empoisonnement tout attentat à la vie "d'une personne, par l'effet de substances qui peuvent donner "la mort plus ou moins promptement, de quelque manière "que ces substances aient été employées ou administrées, et "quelles qu'en aient été les suites.

"302. Tout coupable d'assassinat de parricide, d'infanticide, "et d'empoisonnement sera puni de mort . . . .

"303. Seront punis comme coupable d'assassinat tous mal- "faiteurs quelle que soit leur dénomination, qui, pour l'execu- "tion de leurs crimes, emploient des tortures ou commettent "des actes de barbarie.

"304. Le meurtre emportera la peiné de mort lorsqu'il aura "précédé, accompagné, ou suivi un autre crime. Le meurtre "emportera également la peine de mort lorsqu'il aura eu "pour objet soit de préparer, faciliter ou exécuter un délit, "soit de favoriser la fuite ou d'assurer l'impunité des "auteurs ou complices de ce délit. En tout autre cas, le "coupable de meurtre sera puni des travaux forcés à "perpétuité.

309. (After providing for the punishment of "Tout individu qui volontairement aura fait des blessures ou porté des "coups")—"Si les coups portés ou les blessures faites volontairement mais sans intention de donner la mort l'ont pourtant "occasionée le coupable sera puni de la peiné de travaux "forcés à temps" (*i.e.* from five to twenty years, article 19.)

"310. Lors qu'il y aura eu préméditation ou guet-apens la "peiné sera si la mort s'en est suivie celle des travaux forces "a perpétuité.

"319. Quiconque par maladresse, imprudence, inattention, "negligence ou inobservation des règlements aura commis "involontairement un homicide, ou en aura involontairement "été la cause sera puni d'un emprisonnement de trois mois à "deux ans, et d'une amende de cinquante francs à six cents "francs.

"321. Le meurtre ainsi que les blessures et les coups sont "excusables s'ils ont été provoqués par des coups ou des "violences graves envers les personnes.

"322. Les crimes et délits mentionnés au précédent article "sont également excusables s'ils ont été commis en repoussant "pendant [1] le jour l'escalade ou l'infraction des clôtures murs "ou entrée d'une maison on d'un appartement habité ou de "leur dépendances.

"323. Le parricide n'est jamais excusable.

"324. Le meurtre commis par l'époux sur l'épouse, ou par "celle ci sur son époux n'est pas excusable si la vie de "l'époux ou de l'épouse qui a commis le meurtre n'a pas été "mise en peril dans le moment même ou le meurtre a eu "lieu.

"Néanmoins dans le cas d'adultère . . . . le meurtre commis "par l'époux sur son épouse ainsi que sur le complice à "l'instant où il les surprend en flagrant délit dans la maison "conjugale est excusable.

"326. Lorsque le fait d'excuse sera prouvé s'il s'agit d'un "crime emportant la peine de mort ou celle des travaux "forcés à perpétuité, ou celle de la déportation, la peine sera "reduite à un emprisonnement d'un an à cinq ans.

[1] By art. 329 if these acts are done by night or by robbers, the inmates are considered as acting in self-defence if they kill them.

CH. XXVI.

"327. Il n'y a ni crime ni délit, lorsque l'homicide, les "blessures et les coups etaient ordonnés par la loi, et com- "mandés par l'autorité légitime.

"328. Il n'y a ni crime ni délit lorsque l'homicide, les "blessures et les coups etaient commandés par la necessité "actuelle de la legitime defense de soi même ou d'autrui."

[1] The extreme neatness and precision of these provisions may easily blind a careless reader to the numerous and refined distinctions which they involve, and which French writers on the subject have pointed out at great length and with abundant reflections. I will refer to such of them as are in themselves most important, and most curious in relation to our own law, whether by resemblance or contrast.

The first point to be noticed in regard to the whole body of law in question is that it is arranged and conceived of in a totally different way from that in which it would be convenient to arrange our own law.

The series of Articles (291—304) which define common crimes, all involve and depend upon the definition of "meurtre," which must be carefully distinguished both from our "murder," and from our "manslaughter." "Meurtre," is "l'homicide commis volontairement." The mere form of the words would include the causing of death by a wound intentionally given, though not intended to kill,[2] and for many years this interpretation was put upon them by the Cour de Cassation. Its view, or, to use the French expression, its "jurisprudence," was, however, overruled by the legislature, which in 1832 added a special provision to article 309, punishing the causing of death unintentionally by injuries intentionally inflicted. The proper definition therefore of

[1] The following remarks are all founded upon the commentary of MM. Hélie and Adolphe on the Penal Code, vol. iii. pp. 385-551, and vol. iv. pp. 98-198, edition of 1863. The same subject is treated more concisely but substantially to the same effect in M. Hélie's *Pratique Criminelle*, ii. pp. 297-352.

[2] Adolphe and Hélie, iii. p. 399. "La cour de cassation avait jugé par "des arrêts nombreux que 'le veritable esprit des lois est que celui qui a volon- "'tairement fait des blessures ou porte des coups se rend coupable des suites "'qu'ils peuvent avoir ; de sorte que si les blessures ou ces coups donnent la "'mort ils constituent le meurtre.' Cette cour avait même ajouté à la rigueur "de la jurisprudence en déclarant indifférents et non écrits ces mots dont "plusieurs jurés avaient fait suivre leurs reponses, 'Mais sans intention de "'donner la mort.'"

meurtre is "killing with intent to kill," and as the word *meurtre* enters into the definition of assassination, parricide, and infanticide, an intention to kill and not merely to hurt is a part of the definition of each of these crimes.

This at once draws a broad line between French and English law, for there are many cases in which a man may be guilty of murder though he had no intention to kill; in particular the cases in which the intention was to inflict grievous bodily harm, and the cases in which a man is reckless as to the destruction of life. I think that in this the law of England is much to be preferred to the law of France, and that it is a mistake to make the intention to kill the test by which the worst forms of criminal homicide are distinguished from those which are less heinous. The two elements to be considered in distinguishing between the more and the less heinous forms of an offence are public danger and moral guilt, and to these must be added a third which is specially important in cases of homicide, namely, the shock which the offence gives to the public feeling and imagination. When public attention is strongly directed to a crime, and the public imagination is greatly shocked by it, it is of great importance that the punishment should be exemplary and calculated to impress the imagination of the public as much as the crime, and in the opposite direction. The criminal is triumphant and victorious over his enemy and over the law which protects him until he himself has suffered a full equivalent for what he has inflicted, in other words, in the case of homicide, till he has been put to a shameful death, and from this he ought to be excused only on grounds capable of being understood by the commonest and most vulgar minds.

I now proceed to examine the French and English definitions of homicide in the light of these remarks. In the first place, then, is the presence of an intention to kill as distinguished from an intention to inflict grievous bodily harm, accompanied by recklessness whether death follows or not, or by a determination to run the risk of killing in order to obtain an unlawful object, a test of the greater or less public danger of unlawful homicide? It seems to me that the question answers itself by the terms in which it is stated.

CH. XXVI. There is no difference at all between the public danger of violence known to be dangerous to life inflicted with these intents. The habitual use of deadly violence for any unlawful purpose, is if anything more dangerous to the public than its habitual use for the express purpose of killing. The crime of a man who stabs another to gratify his vengeance, not caring whether he kills him or not, appears to me to be rather more dangerous as a precedent than that of a man who for some other motive stabs his enemy in order to kill, because the state of mind in which the stab is given is reached at an earlier stage, and is more likely to be entertained; indeed the matter speaks for itself. The danger to the public consists in the wilful infliction of deadly violence, and is not affected by the intention with which it is inflicted.

If it is impossible to distinguish between the public danger attendant upon these classes of homicide, can any distinction be made between the moral guilt of homicide accompanied with the various intentions referred to? Is there anything to choose morally between the man who violently stabs another in the chest with the definite intention of killing him, and the man who stabs another in the chest with no definite intention at all as to his victim's life or death, but with a feeling of indifference whether he lives or dies? It seems to me that there is nothing to choose between the two men, and that cases may be put in which reckless indifference to the fate of a person intentionally subjected to deadly injury is, if possible, morally worse than an actual intent to kill. For instance, the master of a ship, by a long series of brutal cruelties intended not to kill but to inflict prolonged and exquisite torture which may or may not end in death, does actually kill his victim. This shows more cold blooded, disgusting cruelty than if he had killed by a single blow intended to kill. Or, again, a man wishing to cheat an insurance office, and so to obtain a small sum of money, sets fire to his own dwelling-house well knowing that six people—all of whom are burnt to death—are sleeping above the room which he sets on fire. Morally, this seems to me a murder quite as horrible as poisoning a person in order

to inherit from him. Whether cruelty shows itself in that most hateful of all forms, delight in the infliction of pain, or in callous indifference to the destruction of life, it is in my opinion equally revolting and abominable, and the question whether the wretch who feels it wishes that his victim should live in order that his murderer may enjoy his sufferings; or that he should die in order that his murderer may inherit from him; or is indifferent whether he lives or dies so long as the murderer gains some object of his own by the deadly violence inflicted, seems to me to be irrelevant to his guilt. The distinction is one which I think is founded on no moral difference at all, and if embodied in the law would, I think, lead to distinctions revolting to common sense.

The punishment of *meurtre* by French law is by art. 304, *travaux forcés* for life absolutely, subject to the law as to circumstances of extenuation; but in a variety of cases it may be punished by death. The cases are these:—

Meurtre aggravated by premeditation or waylaying becomes *assassinat*. If it is committed on a natural or adoptive father or mother it becomes parricide. If it is committed on a new-born child (which has been interpreted to mean a child less than three days old), apparently by any one, whether the parent of the child or not, it becomes infanticide. All these offences are punished with death. *Meurtre* is also punishable with death, if it has "preceded, accompanied, or followed "another *crime*" (which may be roughly translated felony), or if it has had for its object the preparation, facilitation, or execution of a *délit* (which may be roughly translated a misdemeanour), or in order to favour the flight or secure the impunity of the authors or accomplices of a *délit*. Upon all these circumstances of aggravation some observations occur.

The premeditation which turns *meurtre* into *assassinat* is defined as a preconceived design, conditional or absolute, "d'attenter à la personne," of a person determinate or indeterminate. There can be no *meurtre* without an intention to kill, but a man might have a formed design to make an attack on the person of another without a formed design to kill him, and [1] it does not seem to be perfectly clear whether

[1] Adolphe et Hélie, iii. pp. 439-440.

CH. XXVI. if A. premeditated the beating, but not the death, of B., and then intentionally beat him to death, A. would be guilty of *assassinat* or not. This is a refinement of little practical importance. It seems to me that the French Code attaches far too much importance to premeditation in reference to the guilt of *meurtre*. As much cruelty, as much indifference to the life of others, a disposition at least as dangerous to society, probably even more dangerous, is shown by sudden as by premeditated murders. The following cases appear to me to set this in a clear light. [1] A., passing along the road, sees a boy sitting on a bridge over a deep river and, out of mere wanton barbarity, pushes him into it and so drowns him. A man makes advances to a girl who repels him. He deliberately but instantly cuts her throat. A man civilly asked to pay a just debt pretends to get the money, loads a rifle and blows out his creditor's brains. In none of these cases is there premeditation unless the word is used in a sense as unnatural, as "aforethought" in "malice aforethought," but each represents even more diabolical cruelty and ferocity than that which is involved in murders premeditated in the natural sense of the word.

The definition of *guet-apens* seems defective, and indeed the object of the introduction of the word into the French law is not apparent. It is scarcely possible to put a case of waylaying without premeditation, and the [2] definition has the strange peculiarity that it includes waiting for a man and excludes pursuing him. If three persons wait at a given point till their victim arrives and then stab him, they are guilty of *guet-apens*. If they hear he is at a certain place, drive up to him in a carriage, and then rush out and stab him, there is no *guet-apens*. [3] The word seems to be regarded as surplusage by the courts.

With respect to parricide or infanticide, the result of the French law is that mere intentional killing without premeditation makes the offence capital. It is singular that

[1] This was suggested to me by a real case. It is like the fabulous stories about French nobles shooting tilers to see them roll off the roof.

[2] "Le *guet-apens* consiste à attendre plus ou moins de temps dans un ou "plusieurs lieux."—Art. 298.

[3] Adolphe et Hélie, iii. p. 435 ; Hélie, *Pratique Criminelle*, ii. p. 303.

there never was any special punishment for parricide in English law. Petty treason, which was the nearest approach to it, did not include the murder of a parent by a child. In France a person convicted of parricide is [1] "conduit sur le "lieu d'exécution en chemise, nu-pieds, et la tête couverte "d'un voile noir." [2] Till 1832 the right hand of the offender was cut off before his execution. The retention of the black veil and the rest seems to our English taste puerile.

With regard to infanticide it is worthy of remark that by French law it is regarded as a specially aggravated form of *meurtre,* which is a curious contrast to the view which with reference to the practical administration of the law may be said to be taken of it in this country.

The article which punishes with death the administration of poison with intent to kill is remarkable not only as showing the detestation which the crime inspires, but because it is difficult to imagine any case which would fall within the definition, and which would not, if the person poisoned survived, fall under article 2, according to which "toute "tentative de *crime* qui aura été manifestée par un com- "mencement d'exécution si elle n'a été suspendu ou si elle "n'a manque son effet que par des circonstances indépend- "antes de la volonté de son auteur est considérée comme le "crime même."

The article which treats as assassins "tous malfaiteurs "quelle que soit leur denomination, qui, pour l'exécution de "leurs crimes, emploient des tortures ou commettent des actes "de barbarie," is singularly indefinite. It stood in the original draft, "Seront punis comme coupables d'assassinat les *garrot- "teurs* les *chauffeurs* et autre malfaiteurs," &c., and it had reference to the cruelties committed by bands of criminals after the earlier stages of the Revolution.

The provision that a *meurtre* which has preceded, accompanied, or followed another crime is to be punished with death has a good deal of similarity to our rule that an intention to commit a felony, if it accompanies an act which causes death, constitutes malice, but the definition

[1] *Code Pénal,* art. 13. [2] Adolphe et Hélie, iii. p 417.

CH. XXVI. of *meurtre* which includes an intention to kill greatly narrows the application of the section. It would not extend, for instance, to the case of a person who, being resisted in committing a robbery, killed the person whom he meant to rob by the most brutal violence, unless it was shown that he had an actual intention to kill, and not merely an intention to inflict such injury, whether it ended fatally or not, as might be necessary for his immediate purpose. This seems to me to err quite as much by being too narrow as our own rule does by being too wide. A man who, in order to rob or ravish or escape the consequences of such a crime, uses deadly violence, careless whether he kills or not, appears to me to be upon the whole as great a criminal as can be met with, and if the punishment of death is retained for any one he ought to die.

[1] There is a curiosity in this section which deserves notice. When it was enacted, there was a controversy whether the mere coincidence of a *meurtre* with an offence or its definite connection with the offence as a means of execution or escape should be taken as the test of the application of the punishment of death. The test was finally settled by taking one test in the case of *crimes* and the other in the case of *délits*.

The French law contains no general term answering to our "manslaughter." Every one "qui volontairement aura "fait des blessures ou porté des coups," and has thereby unintentionally caused death, comes under article 309, manslaughter by negligence would be met by article 319, and the case of manslaughter which but for provocation would be murder is provided for by articles 321-324. Several cases which with us would be manslaughter appear to be omitted. For instance, a man administers poison not with intent to kill (which would bring the offence under article 301) but with intent to annoy, or even with intent to excite passion. Death results. This is not "empoisonnement" under article 301, nor do I see how it can be said to come under the article about blows and wounds unintentionally causing death, nor does it seem to be properly described by any of the terms employed in the article on negligence. Many other cases of the same

[1] Adolphe et Hélie, iii. p. 541, &c.

kind might be put. A man out of mere wantonness gives a false alarm of fire at a theatre. There is a rush to the doors and many persons are smothered. The offender has neither struck nor wounded any one, but he has undoubtedly caused by an unlawful act the death of many.

I may conclude this comparison between the laws of England and France relating to homicide by reference to their provisions as to the nature and effect of provocation.

Meurtre as well as striking and wounding are excusable if they are provoked either "par des coups ou des violences "graves envers les personnes," or by an attempt to break into a dwelling-house by day. They are also excusable in the case of a husband who detects his wife and her adulterer "en "flagrant délit dans la maison conjugale." This definition of provocation is narrower than the one given by the law of England, but there are some curious refinements in the French law. Parricide is never excusable, nor is *meurtre* committed by a husband on his wife or by a wife on her husband, unless the life of the offender was at the moment of the *meurtre* in actual danger—I suppose from the person killed. This provision seems to imply that even if a son's life is in actual danger from his father's violence he, the son, is not "excusable" if he intentionally kills his father unless, indeed, his act is found to be legitimate self-defence. He must, in other words, be punished with death unless the jury find extenuating circumstances. To our English notions this appears extremely hard.

The German law upon this subject is much simpler than the French law and seems to me singularly defective, but it is unnecessary to criticize it minutely, because I have already anticipated the greater part of my remarks upon it in connection with the law of France. The provisions on the subject are as follows:—

Art. 211. Whoever intentionally kills a human being is, if he execute the homicide with premeditation, punished with death for *mord*.

212. Whoever intentionally kills a human being is, if he executes the homicide without premeditation,

CH. XXVI. punished for *todtschlag* with [1] *zuchthaus* for not less than five years.

213. If the manslayer were provoked without any fault of his own by ill usage (*misshandlung*), or serious insult applied by the person killed to himself or to one of his relations (*angehörigen*), or if there are other extenuating circumstances he may be imprisoned for not less than six months.

214. Whoever being engaged in any punishable enterprise intentionally kills any person in order to remove a hindrance which he encounters in his enterprise, or to withdraw himself from being arrested in the act, is punished by *zuchthaus* for not less than ten years or for life.

215. *Todtschlag* of an ancestor is punishable with *zuchthaus* for not less than ten years or for life.

216. If any one is induced to kill a person by the express and earnest request of the person killed, the offender must be imprisoned for not less than three years.

217. A mother who intentionally kills her illegitimate child at or soon after birth is punished with *zuchthaus* for not less than three years.

If there are extenuating circumstances they may be imprisoned for not less than two years.

226. A person who causes death by a bodily injury [not intended to cause death] must be punished with not less than three years' *zuchthaus*, or three years' imprisonment.

229. Whoever intentionally administers poison or any other substance noxious to health to another in order to injure his health, is punished with *zuchthaus* up to ten years.

If grievous bodily harm (*schwere Körper-Verletzung*) is caused by the act, the *zuchthaus* must be for not less than five years. If death is caused the *zuchthaus* must be for not less than ten years, and may be for life.

The causing of bodily harm by negligence is punishable by two years' imprisonment as a maximum, or fine up to 900 marks, but no express provision is made as to causing death by such means.

[1] *Zuchthaus* is the severer form of confinement, answering roughly to our penal servitude.

These provisions seem to me even more defective and objectionable than those of the French law. I cannot understand on what principle a man who is guilty of the premeditated murder of the seducer of his wife or daughter is to be punished with greater severity than a man who, because a husband forbids him to frequent his wife's company, immediately knocks down the husband and despatches him by repeated stabs with a knife; or why a robber who carries arms to subdue resistance, and deliberately kills a man who resists when he tries to rob him, or an officer of justice who tries to apprehend him, is to be considered in any other light than that of a criminal of the worst kind. It also seems extremely strange that a person who kills by the administration of poison not intended to kill should be liable to a severer punishment than a man who kills intentionally without premeditation. A man in order to annoy another or in order to keep him out of the way for a week, gives him a dose of laudanum which happens to cause his death: he must be sent to the *zuchthaus* for ten years, and is liable to be sent there for life. A man seeing a person, on whose death he would inherit a large fortune, standing near a cliff, instantly pushes him over it in order to kill, and does actually kill him: he must be sent to the *zuchthaus* for five years, and cannot be sent there for more than fifteen. It seems to me that the promptitude with which so horrible an act is done aggravates the offender's guilt. Premeditation would at least have excluded a readiness and presence of mind which in such a transaction are infamous.

There are two matters connected with the law of homicide which I have hitherto passed over, because they seem to require separate notice. These are the law relating to duelling and the law relating to suicide.

Duelling has never been made the subject of any special legislation in England. It has always been treated according to circumstances, upon the principles applicable to fighting, wounding, or homicide generally. The result has been this:— If two persons quarrelled, and one challenged the other verbally or otherwise to fight, the challenger committed the offence of inciting to the commission of a crime. This was punished

CH. XXVI. in many instances by the Star Chamber, and may be regarded as one of the instances in which that tribunal legislated (for in reality it was legislation) wisely and beneficially against (to use Lord Bacon's language) "Middle acts towards "crimes not actually committed or perpetrated." If the parties went a step further and actually fought, without killing or maiming each other, each was guilty of an affray or fight, and also of an assault and battery, for it is well-established law that a mutual consent to an unlawful act, such as a fight, does not take away its criminal character. Wounding which did not cause death, or amount to maiming was in early times (as I shall show more particularly in the next chapter) no more than an assault, whatever was the intention with which the wounds were inflicted. Hence, a duel which did not end in death was only a misdemeanour, till the passing of Lord Ellenborough's Act, 43 Geo. 3, c. 58, passed in 1803, to be noticed hereafter. A duel which did end fatally might be either murder or manslaughter, according to the following distinctions:—If the duel was on a sudden falling out, if the parties fought in hot blood and on the spot and one was killed, the offence was only manslaughter, however aggravated the case might be. A strong instance of this is supplied by the [1] case of Walters tried at the Old Bailey, in 1688, for the murder of Pymm. The parties upon a sudden quarrel fought with swords, and Walters ran Pymm through the body. After doing so he dashed his head on the ground with oaths. The jurors who tried the case wished to find this murder on account of the brutality of Walters, but both the judges said it was only manslaughter. It is remarkable that the statute of stabbing, above referred to, would not apply to duels with swords, for it is confined to cases in which a man "that hath not then any weapon drawn" is stabbed.

If a fatal duel took place when the parties were in cool blood, it was held to be murder, and of this there has never been any doubt whatever in this country, though juries not unfrequently acquitted in such cases if they sympathised with the prisoner. I have known several persons, of high

[1] 12 *State Trials*, 113.

standing and reputation in the world, who had been tried for murder and acquitted because they killed their antagonists in duels fairly and had received grievous provocation. The law, however, has never admitted of any doubt upon the subject. [1] Coke and Hale both treat deliberate fatal duels as ordinary murders, and in this they have been followed by numerous later authorities. Amongst the latest and most emphatic are those of [2] Barronet and [3] Barthelemy. They arose out of a duel between Frenchmen in England. The Court of Queen's Bench refused to bail even the seconds of the man who was killed.

The only difference made by law between duelling and other cases of homicide is that the law is, if anything, more strict as to accessories in duelling than it is in other cases. Not only is the second of the person who kills the other guilty of murder, but it has been held [4] in modern times that the second of the man killed is also guilty of murder. Hale doubted whether this was not over severe. He puts the case of A. and B. principals, C. second to A., and D. second to B. A. kills B. A. and C., he says, are clearly principals in the murder, "but D. is not a principal because he was of the part "of him that was killed; and yet I know that some have held "that D. is a principal as well as C., because it is a compact, "and rely much upon the book of 22 Edw. 3, *Corone*, p. 262, "before mentioned, but, as I think, the law was strained too "far in that case, and so it is much more in making D. a "principal in the death of B. that was his friend; though it

[1] *Third Institute*, c. 72, fol. 157. 1 Hale, *P. C.* pp. 452-453.

[2] Dearsley, 51.

[3] Dearsley, 60.

[4] In 1843, in the case of R. *v.* Cuddy (1 Car. and Kir. 210), who was second to Colonel Fawcett in a duel in which Colonel Fawcett was killed by his brother-in-law, Lieutenant Monro. The judges were Williams, J., and Rolfe, B. (afterwards Lord Cranworth). The passage in Hale is in 1 *P. C.* 443. The case referred to in FitzHerbert is in these words :—"Deux fueront "arr̃ de mort dun A. ; et troue fuit que ils fueront a trouers et debate et "lun voile quar̃ parcuss. laut. oue son cote et laut luy en m̃ le mañ, et cestz "A. vient parentr̃ eux pur eux departr̃ et par enter eux il fuit occis. ꝑ que ils "fuer̃t ambideux pend pur ce que chñ deux fuit en volunte daũ occis. aut. "issint ne puit dit infort." The sense is plain, but I cannot construe "quar̃ parcuss." nor "m̃ le mañ." The general meaning is that one tried to strike the other with the knife, that the other got hold of it, and that A. was killed in trying to part them. As the case is stated, it seems very hard to hang the man who did not draw the knife, but probably when he "m̃ le mañ" (whatever that precisely means), he got the knife from his adversary, and in trying to stab him killed A.

CH. XXVI. "be, I confess, a great misdemeanour, yet I think it is not "murder." In the report of R. *v.* Cuddy, Williams, J., is said, after laying down the principle that "where two persons "go out to fight a deliberate duel, and death ensues, all persons who are present on the occasion encouraging or promoting that death will be guilty of abetting the principal "offender," to have referred to Hale's doubt, and to have added, "If this doubt were correct, it might be suggested on "the same principle, that Colonel Fawcett was guilty of "suicide. Such a course is straining the principles of law "till they become revolting to common sense." I think this must be misunderstood by the reporter for two reasons. First, there is no connection between the proposition that the second of the man who is killed is not a principal in his murder and the proposition that the man who is killed is himself guilty of suicide. Each might be as true, or either might consistently with the truth of the other be false. Secondly, I see nothing opposed to common sense in saying that a man killed in a duel is guilty of suicide. He consents to take his chance of being killed, and intentionally enables his adversary to kill him. If he was wounded and survived, I do not see how he could defend himself against a charge of being an accessory before the fact, or principal in the second degree, in the offence of the man who shot him with intent to kill or do grievous bodily harm.

The question whether a surgeon present at a duel would be guilty of murder if either party was killed would be one of some difficulty, but it will probably never be raised. The principles on which the question whether presence on such an occasion involves guilt or not are stated [1] by Vaughan, J., in R. *v.* Young, and they were elaborately considered in some of the judgments delivered in the recent case of [2] R. *v.* Coney, which settled the law as to prize fighting.

The law of France upon this subject is extremely singular. It is stated by [3] M. Hélie as follows:—"La jurisprudence a "pendant longtemps admis et déclaré que les Articles 295 et

[1] 8 *C. and P.* p. 644 (1838). This case arose out of a duel between Messrs. Elliot and Mirfin, fought on Wimbledon Common, August 22, 1838.

[2] *L. R.* 8 Q.B.D. p. 541 (1882).

[3] *Pratique Criminelle*, ii. 300.

" 304 [they relate to the definition of *meurtre*] ne peuvent " être appliqués à celui qui dans les chances reciproques d'un " duel a donné la mort à son adversaire sans deloyauté ni " perfidie." He refers to decisions to this effect of the Court of Cassation down to 1828. " Mais cette interprétation, qui " s'appuyait sur la texte du Code et l'esprit de toute la légis- " lation, a été renversé par un nouvel arrêt qui déclare au " contraire que les dispositions des Articles 295 et 304 sont " absolues et ne comportent aucune exceptions; qu'en con- " séquence elles s'appliquent à l'homicide commis dans un " duel." The decisions to this effect were given in 1837. They have been much criticised, but " la jurisprudence a néanmoins " continuée à marcher dans la nouvelle voie où elle était entrée, " et il est aujourd'hui de règle que l'homicide ou les blessures " survenus dans un duel sont passibles de l'application des " Article 295 et suivants du Code Pénal."

Art. 295 is " L'homicide commis volontairement est qualifié " meurtre." To an English lawyer it is equally surprising that there should ever have been any doubt that this definition included killing in a duel, and that the Court of Cassation, after deciding for eighteen years that it did not, should have afterwards continued for forty-five years to hold that it does.

The German *Strafgesetzbuch* has [1] an elaborate series of provisions about duels.

Sending or receiving a challenge to a duel with deadly weapons is punished by imprisonment in a fortress for not more than six months, unless the parties voluntarily give up the duel before it begins. If the challenge is to fight till one of the parties is killed, the imprisonment must be for two months, and may be for two years. Fighting a duel is punished by imprisonment in a fortress for from three months to five years. If one party is killed, the imprisonment must be for two years, or if the duel was of such a character that one of the two must have been killed, for three years. If death or injury is caused [2] by means of an intentional violation of the agreed or customary rules of the duel, the offence

[1] Articles 201-210.

[2] " Mittels vorsätzlicher Uebertretung der vereinbarten oder hergebrachten " Regeln des Zweikampfs."

CH. XXVI. is to be treated according to the ordinary rules as to wounding and killing. [1] "Challenge-bearers, who seriously try to "prevent the duel, seconds, as well as witnesses brought to the duel, physicians, and surgeons are free from punishment."

The effect which these provisions produce on an English reader is that the authors of the *Strafgesetzbuch* can hardly have disapproved of duels, and that it would have been more consistent with their real views to pass measures regulating the terms under which they were to be fought, than to impose punishments for duelling so light as to be sure not to deter. The following passage explains the view taken of the subject [2] by German lawyers:—"The offence of duelling "presents itself neither as a breach of the public peace, nor "as an usurpation by private violence of the public adminis-"tration of justice, but as a punishable gambling with life "and limb. The existence of duelling is an unanswerable "reproach to the treatment by modern legislation of insults "to honour, which treatment does not satisfy our modern "sense of honour, which is exaggerated because it is thoroughly "subjective. In a systematic view of the subject, duelling "occupies in offences against life and limb the same place as "gambling in offences relating to property."

Suicide is by the law of England regarded as a murder committed by a man on himself, and the distinctions between murder and manslaughter apply to this (so far as they are applicable) as well as to the killing of others. There is, however, [3] authority for saying that there is no such offence as self-manslaughter, and the true definition of murder of one's self seems to be [4] where a man kills himself intentionally, to which Hale would add, "or accidentally," by an act amounting to felony, as in the case where A., striking at B. with a knife, intending to kill B., misses B. and kills himself. [5] Suicide is held to be murder so fully, that every one who aids or abets suicide is guilty of murder. If, for instance, two lovers try to drown themselves together, and one is drowned and the other escapes, the survivor is guilty of murder.

[1] Art. 209. [2] Das Deutsche Reichsstrafrecht, von Von Liszt, Berlin, 1881.
[3] R. *v.* Burgess, *L. and C.* p. 258.
[4] For authorities, see my *Digest*, Art. 227, p. 151.
Hale, *P. C.* 412-413.

The history of the law relating to suicide has only one step. CH. XXVI.

In Bracton's time, a person who committed suicide [1] in order to avoid conviction for a crime, forfeited his lands. Other suicides forfeited their goods only. This distinction was forgotten before the time of [2] Staundforde. The law in other respects remained unaltered till 1870, when forfeitures for felony were abolished by 33 & 34 Vic. c. 23.

A custom formerly prevailed of burying persons against whom a coroner's jury had found a verdict of *felo de se* at cross roads, with a stake driven through the body. I know of no legal authority for this custom. It is not mentioned by any of the authors cited as a consequence of such a verdict, nor does Blackstone refer to it. Probably, like the custom of gibbeting, which certainly existed long before the statute 25 Geo. 2, c. 37, it originated, without any legal warrant, in circumstances now forgotten. It was, however, abolished in 1823 by 4 Geo. 4, c. 52, which enacted that thenceforth it should not be lawful for any coroner to issue his warrant for the interment of a *felo de se* "in any public "highway." He was to order the body to be privately buried in a churchyard, or other burial-ground, "without any "stake being driven through the body," between nine and twelve at night, and without any religious rites. This has been further altered by 45 & 46 Vic. c. 19 (1882), which provides that the body of a suicide may be buried in any way authorized by 43 & 44 Vic. c. 41, *i.e.*, either silently or with such Christian and orderly religious service at the grave as the person having charge of the body thinks fit. The act is so worded as to lead any ordinary reader to suppose that till it passed suicides were buried at a cross road with a stake through their bodies.

The French law upon this subject is remarkable. It is stated

[1] "Si quis reus fuerit alicujus criminis, ita quod captus fuerit pro morte "hominis vel cum furto manifesto, et cum utlagatus fuerit, vel in aliquo scelere "et maleficio deprehensus et metu criminis imminentis mortem ibi consciverit "hæredem non habebit. Si quis autem tædio vitæ vel impatientia doloris "alicujus seipsum interfecerit, nunquam habere poterit, et talis non amittit "hæreditatem sed tantum bona ejus mobilia confiscentur."—Bracton, ii. 506.

[2] Staundforde, 19 D.; and see Lambard, p. 247, Coke, *Third Institute*, 54, and 1 Hale, *P. C.* 411 *et seq.*

CH. XXVI.

as follows by [1] M. Hélie :—"La loi n'a point incriminé le "suicide. Le fait de complicité est-il punissable? La négative "est évidente, puisqu'il n'y a pas de participation criminelle "à un fait qui ne constitue en lui-même ni crime ni délit. "L'agent qui a provoqué un tiers à suicide, qui l'a aidé "dans ses préparatifs, qui lui a fourni ses instruments ou les "armes, commet un acte immoral, mais est à l'abri de la "répression. Mais si cet agent, pour obéir à la voix de l'in-"sensé qui veut mourir, a prêté son bras et tenu l'arme de-"structive, s'il a consommé l'homicide, est-ce encore là un "acte de complicité, ne devient-il pas coupable d'homicide "volontaire? La [2] jurisprudence a répondu 'qu'il n'y a de "'suicide proprement dit, que lorsqu'une personne se donne "'elle-même la mort, que l'action par laquelle une personne "'donne volontairement la mort a autrui constitué un homicide "'et non un acte de complicité de suicide.' Et dans une espèce, "où deux personnes ayant voulu se donner à la fois la mort, "l'une aurait survécu 'que le consentement de la victime "'d'une voie de fait homicide ne saurait legitimer cet acte: "'qu'il ne peut resulter une exception à ce principe, de la "'circonstance que l'auteur du fait consenti de meurtre a "'voulu en même temps attenter à sa propre vie; que la "'criminalité de l'acte resulte du concours de la volonté et "'du fait qui en a été la conséquence.'"

M. Hélie's personal opinion appears to be that this view of the law is strained. It no doubt suggests the conclusion that the Court of Cassation thought that the Penal Code was too favourable to suicide.

The only article in the German *Strafgesetzbuch* which throws any light on the view taken of suicide by the German law is Article 216, which, in providing for the punishment of various cases of homicide, says:—"If a person is induced to "kill another by the express and serious request of the per-"son killed, he must be imprisoned for not less than three "years" (and by Article 16 not more than five). No mention is made of suicide proper.

[1] *Pratique Criminelle*, ii. 299.

[2] In French law "jurisprudence" answers to the expression "the autho-"rities," as used by English lawyers, and means principally the result of decided cases. "Espèce" is exactly our "case."

The Draft Penal Code proposed to make the abetment of suicide a special offence, subject to penal servitude for life as a maximum punishment. The attempt to commit suicide was to be punishable by two years' imprisonment and hard labour. The definition of homicide ("Homicide is the killing "of a human being by another") excluded suicide.

The abetment of suicide may, under circumstances, be as great a moral offence as the abetment of murder. Suppose, for instance, the heir to a large property were to persuade the owner of it to kill himself by making him believe that a dog by which he had been bitten was mad, and that his choice was between suicide and a death of torture; or suppose the seducer of a girl on her becoming pregnant goaded her into suicide in order to rid himself of an incumbrance,—such a person ought, I think, to be subjected to punishment of extreme severity. The difference between such offenders and accessories before the fact to murder is that their conduct involves much less public danger, though it may involve equal moral guilt. Suicide is the only offence which under no circumstances can produce alarm. It would, I think, be a pity if parliament were to enact any measure tending to alter the feeling with which it is and ought to be regarded. As an instance of popular feeling on the subject, I may mention a case I once tried at Norwich, in which a man—I think drunk at the time—tried to poison himself in a public house. When called on for his defence, he burst out with all the appearance of indignant innocence:—"I try to kill myself! I cannot "answer for what I might do when drunk, but I was all "through Central India with Sir Hugh Rose in 1857, I was "in so many general actions, and so many times under fire, "and can any one believe that if I knew what I was about "I could go and do a dirty, cowardly act like that?" He was acquitted.

CHAPTER XXVII.

OFFENCES AGAINST THE PERSON OTHER THAN HOMICIDE.

CH. XXVII.

I NOW come to the offences against the person other than homicide, which are punished by the law of England.

Before the Conquest such offences formed an elaborate and extensive branch of the law, but the offences were treated rather as torts than as crimes. [1] Some of the laws set forth with the utmost minuteness and particularity the compensation to be made for every sort of bodily injury. After the Conquest the offence of wounding seems to have been regarded as a crime rather than as a civil injury, but the notices of it are extremely scanty. Bracton gives an [2] elaborate definition of a maim. He mentions one kind of maim, castration, for which the [3] punishment was sometimes capital, sometimes perpetual exile and forfeiture of goods. He also mentions the appeal "de pace et plagis" of breach of the peace and wounding, but there is nothing to show that in his day such offences were punished otherwise than upon an appeal or private accusation.

As I have already observed, the rule "voluntas pro facto" was considered at one time to apply to the case of attempts

[1] Æthelbirht, 32-72, 1 Thorpe, pp. 13-21; Alfred, 44-77, 1 Thorpe, pp. 93-101. There are less elaborate provisions in the other laws.

[2] "Mahemium vero dici poterit ubi aliquis in aliquâ parte sui corporis "effectus sit inutilis ad pugnandum, et maxime per illum quem appellat, ut "si ossa extrahuntur a capite, et skerda" (scurf) "magna levetur ut præ-"dictum est. Item si os frangatur, vel pes, vel manus, vel digitus, vel articulus "pedis, vel manus, vel aliud membrum abscindatur, vel per plagam factam "contracti sunt nervi, et membrum aliquod, vel quod digiti curvi reddantur, "vel si oculus effossus fuerit, vel aliud fiat in corpore hominis per quod minus "habilis et utilis reddatur ad se defendendum," &c.—Bracton, ii. p. 468; *De Cor.* cxxiv. 3, fo. 145*b*.

[3] Fo. 144*b* and fo. 155, p. 146.

to murder, but this did not last long, and till late in the seventeenth century the most violent crimes against the person were treated as misdemeanours punishable with fine and imprisonment. Thus [1] Lambard mentions "grievous "fine" as the punishment "if any person have maimed "another of any member whereby he is less able to fight, as "by putting out his eye, striking off his hand, finger, or foot, "beating out his fore teeth, or breaking his skull." Fine also is the punishment "if any have committed unlawful assault, "beating, wounding, or such like trespasses against the body "of any man." The only statutes relating to personal injuries during all this period were of the narrowest and most special kind. I may mention as illustrations 5 Hen. 4, c. 5 (1418), which made it felony to cut out the tongue or put out the eyes of any person by malice prepense; and 37 Hen. 8, c. 6, s. 5 (1545), which, in dealing with many other subjects, incidentally enacts that every one who shall "cut or cause to "be cut off the ear or ears of any of the king's subjects, "otherwise than by the authority of the law, chance medley, "sudden affray, or adventure," should pay treble damages and be fined £10; and 5 & 6 Edw. 6, c. 4, s. 3, which punishes striking with a weapon in churches or churchyards.

The extraordinary lenity of the English criminal law towards the most atrocious acts of personal violence forms a remarkable contrast to its extraordinary severity with regard to offences against property. I am not prepared to suggest any explanation of the fact, but several instances may be referred to which illustrate it.

[2] In 1573, one Peter Birchet, "who had the name of a "Puritan, but was disordered in his senses, stabbed [3] Hawkins, "an officer in the queen's navy, in the Strand, through the "right arm into the body, about the arm-hole, and said he "took him for Mr. Hatton, captain of the Guards, and one of "the Privy Chamber, whom he was moved to kill by the "Spirit of God, by which he shall do God and his country "acceptable service, because he was an enemy of God's

[1] P. 429. [2] Neal's *History of the Puritans*, i. p. 247.

[3] Probably the famous Sir John Hawkins. He was made Treasurer and Comptroller of the Navy in 1573. See article "Hawkins," in *Cyclopædia Britannica*.

CH. XXVII. "and a maintainer of papistry. In which opinion he persisted without any signs of repentance, till, for fear of "being burnt for heresy, he recanted before Dr. Sandys, "Bishop of London, and the rest of the Commissioners. The "Queen asked her two chief justices and attorney-general "what corporal punishment the villain might undergo for his "offence: it was proposed to put him to death as a felon, "because a premeditated attempt with an intention of killing "had been so punished by [1] King Edward II., though the party "wounded did not die; but the judges did not apprehend "this to be law. It was then moved that the Queen, by "virtue of her prerogative, should put him to death by martial law; and, accordingly, a warrant was made out under "the Great Seal for his execution, though the fact was committed in time of peace. This made some of the council "hesitate, apprehending it might prove a very bad precedent. "At length the poor creature put an end to the dispute himself, for, on the 10th November, in the afternoon, he killed "his keeper, Longworth, with one blow, striking him with a "billet on the hinder part of the head as he was looking upon "a book in the prison. For this crime he was next day "indicted and arraigned at the King's Bench, where he confessed the fact, saying that Longworth, in his imagination, "was Hatton. There he received judgment for murder, and "the next day, November 12th, had his right hand first cut "off at the place in the Strand where he struck Hawkins, "and was then immediately hanged on a gibbet erected purposely between eight and nine of the clock in the morning, "and continued hanging there three days. The poor man "talked very wildly, and was by fits downright mad, so that if "he had been shut up in Bedlam after his first attempt, as he "might have been, all further mischief would have been prevented." This story is remarkable on account of the light which it throws on the absence of any legal provision for the most desperate attempts to murder, on the indifference felt at the time to madness as an excuse for crime, and on the extreme promptitude with which in certain cases punishment might be made to follow offences.

[1] See Vol. II. p. 223.

Several instances of the indifference with which crimes of violence not extending to the infliction of death were regarded, occur in the Life of Lord Herbert of Cherbury. His father [1] he says, was "barbarously assaulted by many men in the "churchyard at Lanervil, at what time he would have appre- "hended a man who denied to appear to justice; for defend- "ing himself against them all by the help only of one John "ap Howell Corbet, he chased his adversaries, until a villain "coming behind him, did over the shoulders of others wound "him on the head behind with a forest-bill until he fell down, "though recovering himself again, notwithstanding his skull "was cut through to the pia mater of his brain, he saw his "adversaries fly away, and after walked home to his house at "Llyssyn, where, after he was cured, he offered a single com- "bat to the chief of the family by whose procurement it was "thought the mischief was committed." Lord Herbert himself, according to his own account, fought a regular battle in Scotland Yard, with a Sir John Ayres, who accused him of having seduced Lady Ayres. [2] As a matter of course, Sir John Ayres and four armed men were shamefully defeated by Lord Herbert and one "little Shropshire boy," with a little assistance from bystanders, though Lord Herbert was taken by surprise, thrown from his horse, and had his sword broken within a foot of the hilt. The matter was brought before the Council, who ordered Lord Herbert not to challenge Sir John Ayres, "nor to receive any message from him in the way of "fighting." As for Sir John, he appears not to have been punished in any way except that his father disinherited him,

[1] *Life of Lord Herbert of Cherbury*, p. 4. The incident probably happened late in the sixteenth century. Lord Herbert gives no dates.

[2] *Life of Lord Herbert*, pp. 150-166. Falstaff's exploits on Gadshill, as related by himself, are nothing to Lord Herbert's, yet he probably was a man of courage, and was certainly a remarkable person in other ways. It is, however, to say the least, extraordinary that he should have been able and willing to fight twelve robbers at once. "Taking a sword in one hand and a "little target in the other, I did in my shirt" (he had been roused from his sleep by hearing them talking) "run down the stairs, open the doors suddenly, "and charged ten or twelve of them with such fury that they ran away, some "throwing away their halberts, others hurting their fellows to make them go "faster in a narrow way they were to pass, in which disordered manner I "drove them to the middle of the street by the Exchange, where, finding my "bare feet hurt by the stones I trod on, I thought fit to return home and "leave them to their flight."—Pp. 225-226.

CH. XXVII. and his wife sent a letter saying "that her husband did lie "falsely" in attacking her character, "and most falsely of all "did he lie" in saying that she had confessed her guilt to him.

The case of [1] Giles, tried by Jeffreys in 1679, for a determined attempt to murder Arnold (already referred to) sets the defects of the law as it then stood in the strongest light. Giles and several others waylaid Arnold, and did their very utmost to assassinate him, giving him many stabs with a sword, one of which in his left side was seven inches deep, and numerous cuts with knives. Upon conviction Giles was sentenced to fine, imprisonment, and pillory.

By a variety of acts of parliament this great defect in the law was gradually filled up. These enactments were of an occasional, limited kind, but by degrees they came to form the most elaborate and complete body of law upon the subject which exists in any country. It would be tedious and useless to give their history at length, but I will state enough of it to show its nature and its leading points.

The first act of the kind was the Coventry Act, 22 & 23 Chas. 2, c. 1. It recites that on the 21st December, 1670, "a "violent and inhuman attempt was made upon the person of "Sir John Coventry . . . and upon the person of his "servant William Wylkes, by a considerable number of armed "men." It then proceeds to outlaw the persons indicted for the offence, which seems to have been charged as robbery, and it goes on to enact that it shall be felony without benefit of clergy, "of malice, forethought, and by lying in wait," to "unlawfully cut out or disable the tongue, put out an eye, "slit the nose, or cut off or disable any limb or member of "any subject of his Majesty with intention in so doing to "maim or disfigure in any of the manners before mentioned "such his Majesty's subject." So narrowly was this act construed that in the well known case of [2] R. *v.* Coke and Woodburn, the prisoner took the point that his intent was to murder and not to disfigure. He was convicted because the chief justice told the jury that he must be convicted if they thought he meant to disfigure in order to kill. In precisely the same spirit, after Guiscard's attempt on the life of Harley,

[1] 7 *St. Tr.* 1129.

[2] 16 *Ib.* 53.

an act was passed (9 Anne, c. 16) reciting Guiscard's offence in the preamble, and making it felony without benefit of clergy to "unlawfully attempt to kill, or unlawfully assault and "strike, or wound any person, being one of the most honour-"able Privy Council of her Majesty, her heirs or successors, "when in the execution of his office of a privy counsellor in "council or in any committee of council."

In 1722, the depredations and acts of violence of deer-stealers, known as the Waltham Blacks, led to the passing an act (9 Geo. 1, c. 22) known as the Black Act, which amongst many other provisions as to offences committed or likely to be committed by gangs of deer-stealers made it felony to "wilfully "and maliciously shoot at any person, in any dwelling-house "or other place." In later acts special provisions were made [1] for the punishment of wounding with intent to hinder the exportation of corn, [2] for wounding seamen pursuing their lawful occupations, and some others.

The first act approaching to generality on this subject was 43 Geo. 3, c. 58, passed in 1803, known from its author as Lord Ellenborough's Act. The first section of this act may be regarded as the germ of much subsequent legislation, as it punishes many of the worst forms of bodily violence. It continued in force till 1828, when it was repealed and re-enacted with additions by 9 Geo. 4, c. 31. This act repealed, so far as related to England, all the earlier acts relating to personal violence. It was itself repealed and re-enacted in an extended form as regards both England and Ireland in 1861 by 24 & 25 Vic. c. 100, which is still in force.

I will now proceed to offer some remarks upon this statute, which is as elaborate and complete as the early law upon the subject was crude and imperfect.

In consists in all of 79 sections. The first ten relate to murder and manslaughter. They do not define these offences, but provide for their trial and punishment. I need add nothing as to their provisions to what has already been said in the chapter on homicide.

Sections 11, 12, 13, 14, and 15 relate to attempts to commit

[1] 11 Geo. 2, c. 22.

[2] 33 Geo. 2, c. 67, s. 2.

CH. XXVII. murder, and punish specifically each of seven different ways of attempting to commit murder, namely (1) administering poison; (2) wounding; (3) destroying or damaging buildings with gunpowder or other explosive substances; (4) attempting to administer poison; (5) shooting at any person; (6) attempting by drawing a trigger or otherwise to discharge loaded arms at any person; (7) attempting to drown, suffocate, or strangle any person with intent, in any one of these seven cases, to commit murder. Section 15 punishes all attempts to commit murder in any manner other than the seven specifically mentioned. In reading these sections it is impossible not to ask why the offence of attempting to commit murder should not be punished by a single simple section instead of five sections, one of which is extremely complicated?

Upon grounds of expediency the only possible answer is that nothing can be more clumsy.

The historical explanation is this. Originally, an attempt to commit murder, by whatever means it was made, was only a common law misdemeanour.

The first alteration of any importance in this was made in 1803, by 43 Geo. 3, c. 58, which made it a capital felony to shoot at any person, or to present and try to fire a loaded gun at any person, or to cut or stab any person with intent to murder, rob, maim, disfigure or disable, or to do grievous bodily harm to any person, or to resist a lawful apprehension or detainer, or to administer poison with intent to murder; subject, however, to a proviso that in cases in which if death had followed, the offender would not have been guilty of murder he should not be guilty of felony under the statute.

The statute converted into capital felonies all desperate attacks upon the person, including the worst kinds of attempts to commit murder, but under its provisions all attempts to commit murder which did not involve the infliction of actual bodily harm of a serious kind or an attempt to inflict it, by shooting or the administration of poison, continued to be misdemeanours. The act for instance did not extend to the case of a man who, with intent to murder, pushed another

over a cliff, or threw him overboard from a ship, if his life was saved.

By 9 Geo. 4, c. 31, s. 11, the provisions of the act of George III. were re-enacted, so far as attempts to murder were concerned, and attempts to "drown, suffocate, or strangle" were put on the same footing as attempts to murder by shooting, stabbing, or poisoning; and by s. 12, shooting, attempting to shoot, and wounding with intent to resist apprehension, maim, disfigure, disable, or do grievous bodily harm which, if death had ensued would have been murder, were made capital. The act of George III. was thus re-enacted, but its provisions were divided into two parts. By 7 Will. 4, and 1 Vic. c. 85, capital punishment in cases of attempting to murder was confined to attempts by poisoning, stabbing, cutting and wounding, with that intent. The provision as to wounding included wounding by fire-arms.

Attempts to murder by attempting to administer poison, or by attempting to shoot, or to drown or strangle, were no longer to be capital. And some other modes of attempting to commit murder were made felonies punishable with secondary punishment. Wounding with intent to disfigure, disable, or do grievous bodily harm, which had been a capital felony under 9 Geo. 4, c. 31, became a felony punishable with secondary punishment.

In 1861, all attempts to murder, whether by the actual infliction of bodily injury or the actual administration of poison, or by attempts to inflict bodily injury, or to administer poison, were taken out of the list of capital crimes. But this was done, not by throwing the older provisions into one section, but by re-enacting each of them with some variations and amplifications of language shown by decided cases to be required, and subjecting each offence to secondary instead of capital punishment.

In a few words, the language of sections 11 and 14 of the act of 1861 preserves the memory of the attempts made in 1828 and 1837 to divide the crime of attempting to commit murder into two classes, one punishable by death, the other by secondary punishment, the distinction between the two consisting in the actual iufliction of bodily harm or its absence.

CH. XXVII. Every other section of the act of 1861 has a history of its own. Section 12, which punishes attempts to murder by blowing up buildings with gunpowder, &c., is a re-enactment of 9 & 10 Vic. c. 25, passed in 1846. This act simply provided for an omission from the older law, and as it did so after capital punishments had ceased to be common, the offence was never capital. Till 1846 it must have been simply a misdemeanour at common law.

Section 13, which punishes setting fire to a ship with intent to commit murder, came to be enacted as follows:—

By 7 & 8 Geo. 4, c. 30, s. 9, it was a capital felony to set fire to any ship, whether with or without an intent to murder.

By 7 Will. 4, and 1 Vic. c. 89, s. 4, it was enacted that it should be a capital crime to set fire, to cast away, or in anywise destroy any ship with intent to murder, or whereby any person's life should be endangered. Section 13 of the act of 1861 does away in this case with the punishment of death, but re-enacts the greater part of the offence according to the definition given in the earlier act.

I know of no better illustration in the whole statute book of the way in which every line of it has its own special history than is afforded by these sections.

Shortly, their history is this, the very grossest and worst class of offences against the person were, till 1803, treated with that capricious lenity which was as characteristic of the common law as its equally capricious severity. In that year an act was passed which converted into capital crimes a considerable number of such acts, and especially a considerable number of attempts to commit murder.

In 1828 and 1837, by two successive statutes, attempts to commit murder were divided into two classes—the first punished capitally, and the second not so punished—the first class consisting of such offences as involved actual bodily injury, and the other class consisting of offences which involved only an unsuccessful attempt to inflict such injuries. In 1861 the distinction was maintained, but the difference removed, the gap which the old common law had left being at the same time clumsily filled up.

CH. XXVII.

It would be possible, and indeed not very difficult, to relate in this manner the history of every section of the act, and of a large number of the phrases which incidentally occur in it, but it would answer no good purpose and would be extremely wearisome. I may, however, notice a few sections which possess some degree of interest.

Section 18, which relates to serious wounds inflicted, not with intent to murder, but with intent to maim, disfigure, or disable, or to do grievous bodily harm, is a remarkable section. [1] Its language is laborious and condensed in the highest degree, and creates twenty-four separate offences as it forbids every combination of any one of four actions with any one of six intentions. The history of the section is as follows:—

The Coventry Act made it felony to cut with intent to disfigure. The Black Act made it felony to shoot at any one. The act of 1803 made it felony to shoot or to try to shoot at any one, or to cut or stab with intent to rob, maim, disfigure, disable, or resist lawful apprehension, under such circumstances that if death had ensued the offence would have been murder. This was re-enacted by 9 Geo. 4, c. 31, s. 12, and by 7 Will. 4, and 1 Vic. c. 85, s. 4, which substituted secondary for capital punishment in such cases, and this last section with some small additions was re-enacted by the section in question, which thus represents four previous enactments and various cases decided upon them.

I pass over many sections punishing particular acts of

[1] "Whosoever shall unlawfully and maliciously, by any means whatsoever, "wound or cause any grievous bodily harm to any person, or shoot at any "person, or by drawing a trigger, or in any other manner attempt to discharge "any kind of loaded arms at any person, with intent, in any of the cases "aforesaid, to maim, disfigure, or disable any person, or to do some other "grievous bodily harm to any person, or with intent to resist or prevent the "lawful apprehension or detainer of any person, shall," &c.

This forbids four acts, viz. :—

This forbids four acts		Done with any one of six intents, viz. :
1. Wounding. 2. Causing grievous bodily harm. 3. Shooting at any person. 4. Trying to fire loaded arms at any person.	Done with any one of six intents, viz. :	1. An intent to maim. 2. An intent to disfigure. 3. An intent to disable. 4. An intent to do some other grievous bodily harm. 5. An intent to resist lawful apprehension. 6. An intent to resist lawful detainer.

CH. XXVII. violence to the person, and in particular the whole series of offences relating to the abduction of women, rape, and other such crimes. Their history possesses no special interest and does not illustrate either our political or our social history. I may, however, refer shortly to s. 60, which punishes the endeavour to conceal the birth of a child by a secret disposition of its body. This section is re-enacted from 9 Geo. 4, c. 31, s. 14, which was itself founded upon 43 Geo. 3, c. 58, s. 4. This enactment repealed 21 Jas. 1, c. 27, passed in 1623. The act of James recited that "Many lewd women that "have been delivered of bastard children, to avoid their shame "and to escape punishment, do secretly bury, or conceal the "death of their children, and after, if the child be found "dead, the said women do allege that the child was born "dead. Whereas it falleth out sometimes (although hardly "it is to be proved) that the said child or children were "murdered by the said women." It then enacted (in very involved language) that if any woman were shown to have been delivered of a bastard child and to have concealed its birth, she should "suffer death, as in cases of "murder," unless she could prove by one witness that the child had been born dead. This act was at first temporary, but was afterwards almost accidentally (as it seems) made permanent by 3 Chas. 1, c. 4, s. 10, and 16 Chas. 1, c. 4. The earlier acts upon the subject authorised a conviction for concealment of birth only in cases where the mother of the child was tried for murder, but the crime is now a substantive one, and may be committed by any person whatever.

The history of our law upon personal injuries is certainly not creditable to the legislature, and the result at which we have at present arrived is extremely clumsy, but I think its substance is greatly superior to the corresponding provisions of the French and German codes, besides being much more complete.

One leading distinction between the English and French law upon the subject is that the English law looks almost entirely to the intention with which the wounds were given or injuries inflicted, the French law almost exclusively to the

result, which seems to be a far less satisfactory test both of the moral guilt and of the public danger of an act of violence. It must, however, be recollected that the most serious of all the offences defined by the English law on this subject, namely, injuries inflicted with intent to murder, would, under French law, be dealt with as "tentatives," to commit either *assassinat* or *meurtre*, and would subject the offender upon conviction to the punishment inflicted for those offences.

The provisions of the French law as to bodily injuries not amounting to a *tentative d'assassinat* or *de meurtre* are stated in Articles 309-313 of the Penal Code. They establish a sort of scale for the punishment of "tout individu qui "volontairement aura fait des blessures, ou porté des coups, "ou commis tout autre violence ou voie de fait," as follows:—

If the result is		The punishment is
(*a*) Illness, or incapacity to work for more than twenty days	=	Imprisonment for two to five years, and fine of 16-2,000 francs.
(*b*) Mutilation, amputation, or loss of the use of a member, blindness, loss of an eye, or other permanent infirmity	=	*Reclusion, i.e.* imprisonment with hard labour from 5-10 years.
(*c*) Death	=	*Travaux forcés*, 5-20 years.

If there is premeditation or *guet-apens*, the punishment in case (*a*) is *reclusion;* in case (*b*) *travaux forcés*, 5-20 years; in case (*c*) *travaux forcés* for life.

Similar remarks apply as to the German law relating to attempts. Its provisions as to the intentional and negligent infliction of bodily injury are as follows:—

Art. 223. Whoever intentionally ill treats the body of another, or injures his health, is punished with imprisonment up to three years, for the infliction of bodily harm (*Korperverletzung*).

223*a*. If the injury is inflicted by means of a weapon, particularly a knife, or some other dangerous instrument, or by means of a treacherous attack, or by several persons in common, or by any treatment (*Behandlung*) endangering life, the imprisonment must be for not less than two months.

CH. XXVII.

224. If the bodily injury has for its result that the injured person loses or is permanently injured to a serious extent as to any important member of the body, or if the sight of one eye or both eyes, or his hearing, or his power of speech, or his virility, or if he falls ill, or is crippled, or goes mad, the punishment is *Zuchthaus* up to five years, or imprisonment for not less than one year.

225. If the before-mentioned consequences were intended and happened, the *Zuchthaus* must be from two to ten years.

CHAPTER XXVIII.

HISTORY OF THE LAW RELATING TO THEFT AND SIMILAR OFFENCES.

NEXT to the crimes that affect the State at large and the persons of individuals, come those which affect the properties and proprietary rights of individuals. These are the crimes which are most commonly committed, and for which the most elaborate provision has been made by legislation. The common feature of all of them is that the criminal seeks to deprive the lawful owner of his property. Before relating the history of these offences as defined by the law of England, it will be well to make some observations upon the divisions into which the subject falls apart from technicalities, and when considered solely in reference to those relations of life which are recognised and regulated by law, but are founded on human nature. CH. XXVIII.

Offences relating to property fall into two principal classes, namely, fraudulent offences which consist in its misappropriation, and mischievous offences which consist in its destruction or injury. Theft is the typical fraudulent offence, and arson the typical mischievous offence.

The fraudulent offences may be further classified under four principal heads, namely, fraudulent misappropriations of property; forgery; offences connected with the coin; offences connected with trade. In each of these cases the object of the offender usually is the fraudulent acquisition of the property of another. In the case of forgery this object is attained by tampering with documents; in the case of coinage, offences by tampering with the coin; but each has

CH. XXVIII. the same object in view, namely, the fraudulent acquisition of property. Indeed if there were no special laws against forgery and coinage offences they would nearly all be punishable as cases of obtaining property by false pretences. Coinage offences have sometimes been regarded as offences against the State, and some of them were, down to the present century, regarded as a species of high treason, but this seems to me to be a classification upon a false principle. Such crimes have no special tendency to disturb the public peace, and have no other effect than that of defrauding particular people.

The offences relating to trade are of a special kind, and will be separately considered hereafter.

The present chapter, then, has for its subject offences consisting in the fraudulent misappropriation of property. No branch of the law is more intricate, and few are more technical. In order to understand it fully it is necessary to mention one well-known general principle as to property and proprietary rights. A thing is the property of a man when the man is enabled by law to deal with the thing at his pleasure in every way in which the law permits him to deal with it, and to exclude all other persons from dealing with it in any way whatever except by his consent. Hence property is a general name for a number of different rights, or legal powers which may be exercised over things, each of which rights taken separately may be regarded as the property of the person who is entitled to it. If I am the tenant in fee-simple of a freehold house it is my absolute property, and I may do with it whatever my interest or caprice may suggest, unless the law forbids me. But if I let it to a tenant the full property is in neither of us. The right to occupy on the terms of the lease is his property. The right to receive the rent and to resume the full property of the house at the end of the term are my property. So in the case of chattels. A cargo of wheat may, at the same time, be the property of A., be pledged to B., and be subject to a lien of C.'s. The strongest of all cases of divided ownership is that of trustee and *cestui que* trust. The trustee has the full legal interest, but he holds it solely for the benefit of other persons whose

power over the subject-matter differs in various ways according to the nature of the trust. All proprietary rights, however, have one feature in common: they must exist in relation to some thing, and though in strictness the rights rather than the thing to which they relate form the property of the different persons who are entitled to them, the word property is commonly applied to the thing and not to the rights thus connected with it.

The following are the principal legal relations which can exist between a person and a thing:—

1. The person may be the absolute owner of the thing, no one else having any sort of interest in or power over it.

2. Two or more persons may be the joint owners of a thing, each being entitled either to the whole or to undivided shares of it.

3. There may be a general and a special property in a thing, one person having special rights over it and another being the owner for all other purposes subject to those rights. A pledgee, a bailee, a person entitled to a lien, has a special property in the thing pledged, bailed, or subject to the lien.

4. One or more persons may be the legal owners of a thing as trustees, the beneficial interest being in others according to the nature of the trust.

Besides these modifications of ownership there must be taken into account various modifications of the actual power which a man may have over a thing. These are possession and custody or charge. A moveable thing is said to be in the possession of a man when he is so situated in respect to it that he can act as its owner, and that it may be presumed that he will do so in case of need.

If one person gives to another the possession of a thing on terms that he shall use it for some special purpose and return it on demand, the person to whom such possession is given is said to have the custody or charge of the thing. The word charge is sometimes used, at least by lawyers, to indicate a less permanent and slighter connection with the thing than the word custody, though the two cannot be clearly distinguished. Wine in a cellar, of which the butler has the key, would be said to be in the butler's custody. A drinking-cup

Ch. XXVIII. set before a guest at an inn for his use during his meal is said to be in his charge.

Possession may be either connected with or separated from ownership in any of its degrees, but a custody or charge can exist only where some one other than the custodian is possessor.

Few words known to the law have caused more discussion than the words "possession" and "custody." I pass over, for the present, the questions connected with them, but I shall have to notice them to some extent in their proper place.

The transfer of property from one person to another may take place lawfully by inheritance, by gift or contract, by an act of the law, and in a few cases by the act of a wrongdoer. A thief, for instance, can change the property in stolen coin by paying it as the price of goods to a *bonâ fide* vendor. It follows that, except in the case just mentioned, the misappropriation of property operates not by transferring proprietary rights, but by transferring the power of actual enjoyment of those rights, *i.e.* by dealing with the possession or custody of the thing to which they are attached—and this, it will be seen, is a matter of great importance in reference to the group of crimes under consideration.

The expression "fraudulent misappropriation of property" obviously involves three elements: fraud, property capable of being misappropriated, and misappropriation in its various forms. [1]Fraud, as I have observed elsewhere, involves, speaking generally, the idea of injury wilfully effected or intended to be effected either by deceit or secretly, though it is not inconsistent with open force. It is, however, essential to fraud that the fraudulent person's conduct should not merely be wrongful, but should be intentionally and knowingly wrongful. Fraud is inconsistent with a claim of right made in good faith to do the act complained of. A man who takes possession of property which he really believes to be his own does not take it fraudulently, however unfounded his claim may be. This, if not the only, is nearly the only case in which ignorance of the law affects the legal character of acts done under its influence.

The next element of the crime of wrongful misappropriation is property capable of being misappropriated. If we

[1] Vol. II. pp. 121, 122.

consider the various classes into which property may be divided some of the leading principles upon this subject become self-evident. All property at bottom consists of legal rights, but, as has been already said, the word is commonly applied to the things with which certain classes of rights are associated, and if the word is used in this sense property may be divided into two great classes, namely, immoveable and moveable property, and this distinction corresponds nearly, though not absolutely, with the further distinction between property held by title and property held by possession.

There are, however, immense masses of property, valuable in the highest degree, which fall under neither of these heads, and which consist of legal rights enforceable either against particular persons or against the world at large.

Of rights enforceable against particular persons, debts and other rights arising under contracts, and shares in mercantile undertakings, are the most striking illustrations.

Of rights enforceable against all persons indiscriminately. Patent rights, copyrights, and the right to trade marks are the only specimens which occur to me, but there may be others of the same kind.

In reference to the possibility of fraudulent misappropriation each of these kinds of property differs. Misappropriation, as I have already said, involves not a transfer of proprietary rights in the thing misappropriated, but a transfer of the power of making use of it. If you steal my horse my right to him remains unaffected, but you can use him for all purposes as if he were your own as long as I am unable to discover your crime.

Apply this consideration to each of the four classes of property mentioned.

It is obvious that it is physically impossible to misappropriate a right of action against the world at large, such as the copyright of a book or a patent to an invention, though it is possible to infringe and so to diminish or destroy its value. It is equally obvious that it is physically impossible to misappropriate a right of action against a particular person. No one can steal a debt, or a share in a partnership, or

stock in the funds, but this ought to be coupled with the observation that there is no difficulty in misappropriating things which are valuable only as the symbols of debts or other liabilities, such as promissory notes, bonds, bank-notes, share and stock certificates.

As for immoveable and moveable property, both are obviously capable, in all cases, of being fraudulently misappropriated. The case of moveable property is simple. Such property is commonly held by possession and not by title, and the only advantages of it are those which the possessor has the means of enjoying. It can, therefore, in all cases be misappropriated by removing it from the place where its owner has control over it to some place where it is under the control of a person other than the owner.

Immoveable property is also capable of being misappropriated, though not by removal from place to place. If the heir-at-law of a dying man, knowing that he has been disinherited, secretly destroys his ancestor's will and takes possession of his estate to the exclusion of the devisee, he fraudulently misappropriates the estate as much as a man who picks another's pocket fraudulently misappropriates its contents. The alteration of landmarks, fraudulent inclosures, unlawful evictions by landlords of tenants, unlawful holding over by tenants against landlords, are all cases of the fraudulent misappropriation of immoveable property.

From these considerations a distinction must always exist between offences against moveable and immoveable property. It is in common cases nearly impossible to misappropriate land permanently otherwise than by certain definite means which are usually crimes in themselves. To destroy a will, to forge a deed, to personate a dead man, are crimes punishable with the severest secondary punishment. But land can hardly be made the subject of downright robbery. To drive a man out of his house and to keep forcible possession of his estate without any shadow of right is an offence which in quiet times in England it is almost impossible to commit. Misappropriation, whether of moveable or immoveable property, is possible only where the property misappropriated can be concealed or made away with, which is not

the case with land. The offence of forcible entry and detainer, an offence hardly ever committed in these days though formerly common, has no doubt a resemblance to robbery; but it is distinguished from it by the fact that in cases of forcible entry there is generally a claim of right, so that when the offence is committed it is rather a breach of the peace by the disorderly assertion of an alleged right than a case of misappropriation of property.

It should be observed that these remarks apply only to land, which, so long as its character as land is not destroyed, is immoveable. They have no application to things attached to or growing out of the land which retain their value when detached from it, such as timber or fences; nor do they apply to parts of the land which have a value, as minerals. To dig up and carry off coal, brick-earth, or stone, may be distinguishable, technically, from stealing anything else, but the distinction is purely technical.

Lastly, things which are not the property of any one, and *a fortiori* things which cannot be the subject of property, cannot be misappropriated fraudulently or otherwise. A perfectly wild animal in the possession of its natural freedom belongs to no one; but such animals when tamed or kept in confinement may be the subject of property, and their dead bodies usually belong to some one, and may therefore be misappropriated, and the same is true of things abandoned by the owner, as wreck. The dead body of of a human being is almost the only moveable object known to me which by our law is no one's property, and cannot, so long at all events as it exists as such, become the property of any one. I suppose, however, that anatomical specimens and the like are personal property.

I come now to consider the way in which fraudulent misappropriation may be effected, and for this purpose I shall confine my observations to the fraudulent misappropriation of moveable property.

All misappropriations of property may be brought under one of two general heads.

1. The property misappropriated may be physically removed—taken and carried away—from the place where it is

CH. XXVIII. in the owner's possession, or where, if it is not in his possession, he could take possession of it, to some place where it is in the possession of someone else. This may be done either against the will of the owner, whether secretly or by open force, or by the consent of the owner obtained by fraud.

2. The property, being lawfully in the possession or custody of some person other than the owner, may be withheld from the owner by the possessor or custodian, or may be given by him to some third person.

Under the first head are comprised the offences of theft, robbery, and obtaining property by false pretences. Under the second head are comprised a variety of offences which may be described collectively as criminal breach of trust.

The expression, "criminal breach of trust," is liable, owing to one of the leading peculiarities of the law of England, to be misunderstood, as it includes two totally different kinds of offences; namely, first, breach of confidence, as when a borrower makes away with something lent to him, and secondly the misbehaviour of a trustee, who is the full legal owner of the subject-matter of the trust for the benefit of some other person. The legal considerations, and also the legislative considerations which arise in connection with these two classes of offences, differ widely, and are of great importance. The want of a due recognition of this distinction has thrown great obscurity over the whole of the subject.

Speaking roughly, the history of our law on the subject is this:—

Theft and robbery in their coarsest form were for many centuries capital crimes. Cheating was a misdemeanour at common law. The special form of cheating called obtaining property by false pretences became a statutory misdemeanour in the eighteenth century.

Criminal breach of trust, using the expression in the first of the two senses mentioned above, was for many centuries only a civil injury, though one form of it (larceny by servants) was by fictions about possession held in some cases to be a felony. Many other forms of the offence have at different times, and especially in our own days, been made punishable by statute; but the law upon the subject is still incomplete.

Criminal breach of trust, in the second of the two senses above mentioned—misbehaviour of trustees having the full legal ownership of property—was first made criminal in the year 1857. Up to that time it was punishable only if the circumstances were such as to admit of its being treated as a contempt of the Court of Chancery. CH. XXVIII.

I now proceed to give the history of the law upon the various points to which, in this analysis, I have directed attention.

The punishment of theft is provided for by many of the laws of the early English kings, but I have found no passage which shows that they regarded the word itself as requiring any [1] definition. Indeed, in common cases the word is plainer than any definition of it could be. Theft, according to these laws, seems to have been the crime of crimes. They are inexorable towards it. They assume everywhere that thieves are to be pursued, taken, and put to death there and then. Moreover, the precautions which they take against theft must have been burdensome in the extreme; indeed, if they were ever fully put in practice they must have been inconsistent with commerce and with travelling. A man was presumed to be [2] a thief if he travelled through a wood without shouting or blowing his horn, and [3] laws existed (which lasted down to the time of Bracton) on the subject of the warranty of chattels which must have made it dangerous to an extreme degree to buy anything from a stranger. As I have already said, the question when theft was first made a capital crime is obscure, but it is certain that at every period some thefts were punished with death, and that by Edward I.'s time, at least, the distinction between grand and petty larceny, which lasted till 1827, was fully established.

The first hint at anything like a definition of the offence of theft with which I am acquainted in English law is to be found in Glanville. The subject of the tenth book of his work is, "De debitis laicorum quæ debentur ex diversis

[1] The nearest approach to one is in the laws of Ine (No. 13). Thorpe, i. 111 (8vo. edition). "Thieves we call as far as vii. men, from vii. to xxxv. a 'hloth' "(lot); after that it is a 'here' (host or army)."

[2] Vol. I. p. 61.

[3] See *e.g.* laws of Æthelred, i. 9; Thorpe, i. 290.

CH. XXVIII. "contractibus, videlicet ex venditione, emptione, donatione, "mutuo, commodato, locato conducto, et de plegiis et vadiis, "sive mobilibus sive immobilibus, et de cartis debita conti-"nentibus." The words are remarkable because they show how full the mind of Glanville was of the Roman law. In the thirteenth chapter of the tenth book he deals with debts arising out of the contract of commodatum, and expresses a doubt as to what was to be the measure of damages, what the proof, and who the judge, if a person to whom a thing had been lent to be used at a fixed place for a fixed time, used it elsewhere and for a longer time. "A furto enim omnimodo "excusatur per hoc quod initium habuerit suæ detentionis per "dominum illius rei." This passage is [1] quoted by Coke as a statement of the later doctrine of the common law as to the necessity of an unlawful taking in larceny. The common law can hardly be said to have been in existence when Glanville wrote, but his statement is certainly singular. It seems to show that Glanville supposed that his statement embodied a doctrine of the civil law as then understood, as to the *actio furti*. If, however, this was his opinion, he was mistaken, for there are [2] many texts in the *Digest* which prove that the civil law was the contrary of what he asserts. It is indeed one of the great distinctions between the Roman and the English law of theft that though according to the [3] Roman law "furtum sine contrectatione non fiat," the "con-"trectatio" might, according to that law, take place after the thing stolen had come honestly into the thief's possession. Glanville's doctrine, then, was not taken from the civil law. Whence it came, or how far in his day it extended, I cannot say.

The next author on the subject is Bracton. His account

[1] Coke, *Third Institute*, p. 107. Coke gives what he regards as the equivalent of Glanville's statement. He makes him say, "Furtum non est ubi "initium habet detentionis per dominum rei." *Detentionis* should be *detentio* to make sense. The genitive is right in Glanville. The nominative to his "habuerit" is the person who is excused.

[2] *E.g.* "Si ego tibi poliendum vestimentum locavero, tu vero inscio aut "invito me commodaveris Titio, et Titio furtum factum sit et tibi competit "furti actio quia custodia rei ad te pertinet et mihi adversus te quia non "debueras rem commodare et id faciendo furtum admiseris." *Dig.* xlvii. 48, 4. So, "Si pignore creditor utatur furti tenetur. Eum qui quid utendum accessit "ipse alii commodaverit furti obligari responsum est." *Dig.* xlvii. 54, 1.

[3] *Dig.* xlvii. 37, 19.

of the law of theft [1] is as follows:—"Furtum est secundum "leges contrectatio rei alienæ fraudulenta, cum animo furandi, "invito illo domino cujus res illa fuerit. Est autem quasi "furtum rapina quæ idem est quantum ad nos quod robberia, "et est aliud genus contrectationis contra voluntatem domini "et similis pœna sequitur utrumque delictum et unde prædo "dicitur fur improbus; quis enim magis contrectat rem ali-"quam invito domino quam ille qui vi rapit?" He then goes on to distinguish theft into two classes,—*manifestum*, when the thief is taken in possession of the goods, and *non manifestum*, when he is suspected by common report, and there are heavy presumptions against him. The definition given in the [2] Roman law is very similar to this:—"Furtum est "contrectatio fraudulosa lucri faciendi gratiâ, vel ipsius rei "vel etiam usus ejus possessionisve quod lege naturali "prohibitum est admittere."

There are several important differences between these definitions. Bracton's definition includes the element of "invito domino," which is not expressed in the one given in the *Institutes*. [3] There is, however, much reason to think that it ought to have been inserted in the last-mentioned definition, for some of the Roman lawyers went so far as to doubt whether a robber was a thief if the goods of the owner were surrendered from fear—a doubt which perhaps suggested the concluding part of Bracton's definition.

The words "cum animo furandi," which are in Bracton, are not in the *Institutes* or the *Digest*, and they are no doubt tautologous, though if construed as excluding from the definition of theft the case of a taking under a claim of right they are by no means superfluous. They are in [4] the spirit of the Roman law, which in reference to this, as well as many other branches of the law, attached a full share of importance to the intention of the agent. [5] "Maleficia," says Paulus, "voluntas et propositum delinquentis distinguit."

So far Bracton differs from his model only in being more

[1] Bracton, ii. 503.

[2] *Institutes*, iv. 1, and *Dig.* xlvii. tit. ii. 1, 3. They repeat each other word for word. The passage in the *Digest* is from Paulus *Ad Edictum*.

[3] See passage referred to above, Vol. I. p. 35.

[4] See passages quoted, Vol. I. p. 33.

[5] *Dig.* xlvii. tit. ii. 53.

CH. XXVIII. explicit, but he omits two elements of the Roman law definition which have never been included in our own. The first is contained in the words, "lucri faciendi gratiâ," the second in the words, "usus ejus possessionisve."

To this day it is part of the law of this country, as settled by very modern cases, that the motives which lead a man to commit theft are immaterial, and that the definition of the offence includes an intention to deprive the owner of his property permanently.

Bracton's division of thefts into *manifesta* and *non manifesta* is taken directly from the Roman law. It obviously has relation, not to the crime itself, but to the evidence by which the fact that it was committed is proved. It may have been of some importance in English law so long as the franchise of infangthief, which extended to thieves "taken in "the manner," or "handhabend and backberand," continued to exist, but it has been forgotten for ages. I should conjecture that it was not derived by the English from the Roman law, but that the existence of customs so similar, in times and places so remote from each other, was due to the circumstance that in a very rude state of society such a distinction was likely to present itself as a natural one.

It is remarkable that Bracton is silent upon the subject of the sort of goods which are capable of being stolen, as well as upon the manner in which fraudulent misappropriations of property may be made—indeed the quotations already given contain all that he says upon the theory of theft, though he has much to say as to the mode of prosecuting the offence by appeal.

[1] Britton adds nothing to Bracton on the theory of the law, indeed he does not give any definition of theft; but some of his observations on the course of appeals of larceny may throw indirectly some light upon a very obscure subject. When property was stolen, the person who lost it could proceed against the supposed thief either "by word of felony," in which case battle was waged and the appellee might, if defeated, be hanged; or "the sakeber" (the owner of the goods) "if he pleases, may bring an action for his goods as

[1] Britton, i. 55-59, also 115-122.

"lost; and then he shall not sue judgment of felony but of "trespass only." In [1] describing the form of the appeal Britton says that if the appellee "pleads that the horse was "his own, and that he took him as his own; [2] and as his "chattel lost out of his possession, and can prove it, the "appeal shall be changed from felony to the nature of a "trespass. In this case let it be awarded that the defendant "lose his horse for ever." These passages indicate that an appeal of larceny much resembled an action of trover, and might indeed be converted into one. When the moveable property of one man got into the hands of another, the owner's chance of recovering it was lost by a prosecution on indictment. It was only on a conviction on appeal that the property was restored, till the 21 Hen. 8, c. 11, gave the owner a writ of restitution in such cases. It was obviously therefore much more advantageous for the appellor to sue for trespass than "by words of felony," as in the latter case he might have to do battle. Hence it was the interest of every one concerned to extend the scope of the law of trespass and to restrain the scope of the law of larceny, and this may, I think, have been one reason why it was said to be essential to larceny that the taking, as opposed to the conversion, of the goods should be fraudulent, and why so many different classes of things should have been held not to be the subject of larceny. A man whose horse had been fraudulently carried off by some one to whom he had lent it, or whose timber had been felled and carried away, would be little inclined to quarrel with a view of the law which enabled him to recover the lost property, or damages for it, without risking his life in a trial by combat. Upon this last head the [3] following passage from Britton is significant:—"As to "pigeons, fish, bees, or other wild animals found in a wild

[1] Britton, i. p. 116.

[2] "Et cum soen chatel adirré," "lost him as his own" One MS. reads "ament" for "adirré," which makes better sense, "took him as his own." If the appellee could prove that the horse was his own, and that he lost him, it is difficult to say why he should not keep him after retaking him. If he admitted that the horse belonged to the appellor, but proved that when he (the appellee) took the horse he supposed him to be his own, he could be acquitted of the felony, but would of course have no claim to the horse. I take Mr. Nicholl's translation.

[3] Britton, i. p. 122.

CH. XXVIII. "condition, we ordain that no man have judgment of death "on account of them; but otherwise if they have been "feloniously stolen out of houses, or if they are tame beasts "out of parks." Obviously this is little more than another way of saying that such animals are not the subject of larceny, and that trespass is the proper remedy for an injury done in relation to them. I am inclined to think that at the early period when the law of theft was in process of formation these considerations may have had more to do with the narrow limitations put on it than scruples as to the infliction of capital punishment, for it is certain that the severity of the criminal law rather increased than diminished for many centuries, as felony after felony was excluded from the benefit of clergy.

A statement of the theory of the law of larceny appears in the *Mirror*, of which I have [1] already spoken. It contains much which undoubtedly formed for centuries, and indeed still forms, part of the law. It also contains much which, so far as I know, never was the law, and which is indeed directly opposed to it as it now is, and as for many centuries it has been. The variations between these very early authorities are what it is natural to expect under the circumstances. The law was formed by very slow degrees, and rather by controversy than by express authoritative enactment. Hence in early times persons who held different opinions would state it in different ways. The following are the principal passages in the [2] *Mirror* on this subject:—

"Larceny is the treacherously taking away from another "moveable corporeal goods against the will of him to whom "they do belong by evil getting of the possession or the use "of them. It is said a taking, for bailing or delivery is not in "the case; it is said of moveables corporeal, because of goods "not moveables or not corporeal, as of land, rent, advowsons "of churches, there can be no larceny; it is said treacherously, "because that if the taker of them conceive the goods to be "his own, and that he may well take them, in such case it is

[1] Vol. I. p. 52, *note*.
[2] I quote from a seventeenth century translation, pp. 31-36.

"no offence, nor in case where one conceives that it pleases "the owner of the goods that he take them." CH. XXVIII.

This is, as far as it goes, a perfect definition of the offence of theft as it is still understood in this country. It is more explicit than Bracton's, and the [1] adaptation of the words of the Roman law to a new meaning, whilst the words themselves are retained, is worthy of observation, because it shows that, whilst the Roman law was well known in the time of Edward I. in England, it was intentionally deviated from. There are, however, many other things in the *Mirror* which are not, and hardly can have been, law, indeed some of them contradict the definition given. Thus the author says, "Lar-"ceny is committed sometimes by open thieves, sometimes "by treacherous; as it is in divers kinds of merchandises, and "as it is of labourers who steal their labours: and as it is of "bailiffs, receivers, and administrators of others' goods, who "steal them in not giving their accounts." This is directly opposed to the definition given just before. Labour is not a "chattel corporeal," and a man who does not give in his accounts cannot be said to "take." Elsewhere he says, "into "this offence fall all stealers of others' venison, and of fish in "ponds, and of conies, hares, pheasants, partridges being in "warrens, and other fowl, doves and swans, of the eyeries of "all manner of birds." This is directly opposed to some of the best ascertained and most ancient rules of the law. The author of the *Mirror*, however, in many cases seems to write rather as a casuist than as a lawyer. He goes so far as to say, "Into this offence fall all those who take lands, tene-"ments, houses, or other things, and use them beyond the "appointed time for the loan of them . . . and those who "oftener than twice in the year hold sheriff's tourns, or who "oftener than once in the year hold views of frankpledge in "one court . . . counters" (barristers) "who take outrageous "salary or not deserved," &c.

In the absence of any systematic writers on the criminal

[1] *Institutes*:—"Contrectatio . . . vel ipsius rei vel etiam usus posses-"sionisve."

Mirror:—"Larcine est prise d'autre moeble corporelle treachérousement "contre la volunt de celuy à qui il est per male egaigne de la possession ou "del use."

CH. XXVIII. law between Edward I. and Henry VIII. the growth of the law must be traced in the Year-books. I have examined all the cases vouched by the later writers, but I have not examined the whole of the Year-books for myself, and it is possible, though not probable, that they may contain other decisions of importance bearing on this subject than those which later writers have vouched. In order to give an idea of the gradual development of the law, I will notice the more important of these cases in their chronological order.

The first case is 2 Edw. 3, p. 1, No. 3 (A.D. 1328). A man was indicted in the sheriff's tourn, for that he "felonice "abduxit unum equum rubrum price de tant." He had the indictment removed into the King's Bench, when it was held that the indictment was one on which he could not be tried, as it did not say whether he had taken the horse feloniously or whether he had led it away feloniously after it had been delivered to him lawfully. This is a judicial recognition of part of the doctrine of the *Mirror* as to the proper definition of theft.

In the [1] 22nd Edw. 3 (1349) a man was indicted for feloniously cutting down and carrying off trees. "Et fuit "moue" (I suppose moved, argued) "que ceo ne puit estre "dit felonie pour ce que ne puit estre fait sans grand leyser "et auxi felonice succid n'est bon." If this short note is correct, and if it represents a decision of the court, it shows that the question, whether cutting down a tree and carrying it away amounted to larceny, was arguable so late as the middle of the fourteenth century, which would show how slowly the law was formed. The definition in the *Mirror*, which in many respects is so perfect, confines theft to moveable things; but it is silent as to things which are capable of being made moveable. The reason given in FitzHerbert is remarkable,—cutting down a tree "ne puit estre fait sans "grand leyser." It is not put on the ground that the tree is part of the land on which it grows.

Coke [2] refers to several other cases in the Year-books of Edward III.'s reign in support of the proposition that certain

[1] This case is reported in FitzHerbert, *Corone*, p. 256, but is not in the Year-books.

[2] *Third Institute*, p. 109.

kinds of animals are not the subject of larceny, but his references are wrong—at least I have been unable to verify them. He refers also to [1] some cases of a later date which seldom support the proposition for which they are cited.

Some of them, however, throw light upon the view taken as time went on, and, as such questions came to be brought before the courts, as to the nature of the interest of owners of land in the wild animals living on it.

In 3 Hen. 6, p. 55, No. 34, the Archbishop of Canterbury sued W. T. for entering his warren with force and arms, and chasing and taking [2] his hares. The defendant prayed judgment because the writ said "mille lepõr cep̃ et asportavit," without saying "suos." In an action of trespass he argued the writ says "arbores suas vel blada sua." Otherwise it will abate. So here. The court said that "blada sua" was necessary, because the action would lie only if the corn was really the property of the plaintiff, but this did not apply to hares or other beasts of warren, for they are not really the property of the owner of the warren, but they are his by reason of the warren, and as long as they are in the warren, for if they go out of the warren any one may take them, "and I shall have "no action for them, which proves that the true property in "them is not in me the lord of the warren, so the writ is "good" without the word "suos."

This case is quoted by Coke to show that wild animals are not the subject of larceny. It shows, no doubt, that wild animals are not in the fullest sense of the word the property of the owner of the land where they are, but it does not show that they cannot be stolen. A somewhat similar but

[1] For instance, he quotes 5 Hen. 5, s. 1, to prove that felony cannot be committed on a wild animal. The case is that the plaintiff sued several defendants for breaking into his park and killing *ses sauvages*. The jury found that one of the defendants, "vient en le parke le plaintiffe pur chaser "les savages pur les aver occist, mes il ne occist ascun savage," and they gave forty shillings damages, which the court thought too little. The action is said to have been on the statute, and no doubt was brought upon 3 Edw. 1 (the Statute of Westminster the First), c. 20, which provides that if trespassers in parks are attainted at the suit of the party, great and large amends is to be made to the party, and the defendant shall have three years' imprisonment, and make fine at the king's pleasure. In the case referred to the court thought the damages too small, and ordered the defendant to be imprisoned for three years, and to give security not to repeat his offence, or to abjure the realm.

[2] "s̃ leṽs," &c., but this is inconsistent with the rest of the report.

CH. XXVIII. less simple case occurred 22 Hen. 6, p. 59, No. 13 (A.D. 1444), but I need not notice it in detail.

In 7 Hen. 6, p. 42, No. 18 (A.D. 1429), a singular case is reported. Two persons were indicted because "Quen-"dam W. Waw feloñ scienter latronem Dũi Regis apud "B. receptavẽr, et quædam bona ipsius W. in custodia sua "existeñ vi et armis ceperunt et asportaverunt." Two questions were raised as to the meaning of the indictment; first, whether "scienter" meant that the prisoners knew Waw to be a felon, or that they knew that they received him; and secondly, whether "in custodia *sua*" meant in Waw's custody or in the prisoner's custody. On the second point, assuming that *sua* referred to the prisoners, the question arose whether a man could steal his own goods. It was ingeniously [1] suggested that each of the prisoners might have had half of the goods, and each might have stolen the half which the other had. The prisoners had judgment in their favour, but "il fuit dit que "si jeo vous bail certeins biens a gard et puis jeo eux reprends "felonisement jeo serai pendu, et uncore le property fuit en "moy." The doctrine that a man can steal his own goods from a special owner has kept its place in our text books, but I doubt if it has ever been acted upon.

During the reign of Edward IV. many points connected with the law of larceny were raised and discussed.

One of the most curious occurred in 1471. It is referred to by Coke as 10 Edw. 4, 14, but is described in the Yearbook as 49 Hen. 6, p. 14, No. 9.

William Wody was indicted for stealing six boxes with charters and muniments relating to real property. After much debate this was held, before all the justices in the Exchequer Chamber, not to be felony. The reasons seem to have been, partly because the deeds were not chattels but were of the nature of real property, partly because they had no definite assignable value. As to the boxes, it was argued, and the court seems to have adopted the argument, that the boxes were of the same nature as the deeds contained in them. This appears to me to be one of the most pedantic

[1] "Il peut etre que un deux aura la moity en son gard, et que un prist ceo "que son campagnon duist av' et e contra."

and unmeaning decisions in the whole law. The report ends by recording a dictum of one of the judges that if things are given to a servant to sell or keep, the servant cannot steal them.

Much the most curious case relating to theft in the Year-books is one which was decided in 1474, 13 Edw. 4, p. 9, No. 5. It seems to have excited the greatest attention, and to have been debated both in the Star Chamber and in the Exchequer Chamber. The question was whether a carrier who took elsewhere bales of goods intrusted to him to be carried to Southampton, and broke open the bales and carried off their contents, was guilty of felony or not. At the discussion in the Star Chamber, the chancellor was present and took a leading part. The owner of the goods was an alien merchant who had come with a safe conduct, and the chancellor maintained, amongst other things, that on this account he ought to sue, not according to the law of the land, but "solonq. le ley de nature en le chancery." He also maintained that felony depended on the intention of the party, and that, whether the dishonest person had the goods in his possession or not, his intention was equally felonious. It was finally decided that the act did amount to felony. The principle of the decision was that though a man cannot steal goods bailed to him (in which all the judges except Needham agreed), yet, if the bailee does an act which determines the bailment, he may steal the goods.

In this case the carrier had determined the bailment by taking the goods to the wrong place and breaking open the bales.

This has always appeared an extraordinary decision, as, to all common apprehension, theft of the whole thing bailed must determine the bailment quite as much as a theft of part of it. I think it obvious from the report that the decision was a compromise intended to propitiate the chancellor, and perhaps the king. This required a deviation from the common law, which was accordingly made, but was as slight as the judges could make it. They would have liked to hold that where the original taking was lawful no subsequent dealing with the property could be felonious. The chancellor,

CH. XXVIII. who seems to have had regard rather to the position of the owner of the goods than to the criminality of the carrier, seems to have wished to make the matter turn upon the moral character of the act of misappropriation. The judges resorted to the expedient of treating the breaking bulk as a new taking. They thus preserved the common law definition of theft, but qualified it by an obscure distinction resting on no definite principle.

An opinion was expressed in the course of the arguments in this case that there was a difference between having the possession of a thing, and a mere charge of it, as in the cases of a tavern-keeper lending his guest a cup to drink out of, or a cook or butler who has property belonging to his master, not in order to keep or dispose of it, but to serve his master with it as a servant.

The dictum as to servants was reconsidered in 1488 (3 Hen. 7, p. 12, No. 9). The report is in a very few words, and shows how uncertain the law then was. Hussey "demanda question. Si un shepherd emble les brebis qui sont "en son gard; ou un botler les pieces qui sont en sa gard, ou "servants autres choses qui sont en lour gard, si ceo sera dit "felony, et semble a luy que si. Et rehers un cas qui fuit "comment un botler avoit emble certein stuffe que fuit en sa "gard et fuit pendu pur ceo. *Haugh:* Reherce le cas de "Adam, goldsmith de London, qui avoit emble certein stuffe "qui fuit en sa gard et fuit pendu pur ceo. *Brian:* Il ne "poet estre felony pur ceo que il ne poet prendre ceo vi et "armis quand il avoit le gard de ceo. Et les justices fueront "de même l'opinion et issint nient discusse." This seems to have been a conference between the judges at Serjeants' Inn. The decision here (if such it was) seems to have been that misappropriation by a servant did not amount to theft, though there was authority the other way which had been acted on.

In 1523 (14 Hen. 8, p. 1, No. 1) the Bishop of London sued in trespass N., who had entered the Bishop's close and taken herons and shovelers. N. pleaded that the bishop had let to him on lease land in which the herons made their nests and he took them. The bishop replied that the lease excepted

the wood and underwood, and the herons and shovelers built their nests in trees. There was an argument in the case as to the nature of the bishop's interest in the herons. The court held that the reservation of the trees reserved the herons as a part of the profits arising out of the trees. "De ceux "choses et profits qui viennent ratione fundi, come conils, "partriges, et mines, sils ne sont excepts le lessee les aura. "Mes si ce lessor reserve a lui un pond il aura le poisson "pur ceo que ceo est le causa sine qua non; issint est s'il "except le wear il aura le poisson; car le wear n'est que "staks et autres choses."

The case shows that wild birds, animals, and fish were regarded as, in a sense, part of the land, or at least, of its casual profits. In a [1] later case it was held that peacocks might be stolen, because they were tame creatures like domestic fowls, and so differed from fowls and beasts of warren, "Car le prisel de eux avec felonieus entent n'est felony."

Such are the principal statements of the Year-books as to the law relating to larceny. They are collected and repeated first by [2] Staundford, who in this case, as in the case of homicide, seems to consider that Bracton, whom he quotes verbatim and at length, and the decisions in the Year-books make up the law. Lambard [3] goes over the same ground in a more complete and systematic way than Staundford. [4] Coke and [5] Hale repeat the earlier authorities, but add little to them. Neither treats the subject in what can be regarded as a satisfactory manner. After their time the main outline of the subject may be considered as having been fixed, and its subsequent development consisted partly of decisions by the courts making the old principles more distinct by applying them to an endless variety of combinations of facts, and partly—and to a much greater extent—of statutes intended to patch up the defects of the common law. Its principles have never been varied down to the present day. Before noticing the statutes I will try to state in general

[1] 19 Hen. 8, p. 2, No. 11, 1528.
[2] Cap. 15, fo. 24.
[3] Lambard, pp. 271-293.
[4] *Third Institute*, chap. xlvii. pp. 106-110.
[5] 1 *Pl. Cr.* chap. xliii. pp. 503-516.

CH. XXVIII. terms the result of the different authorities to which I have referred as to the common law.

The natural division of the subject appears to me to be, as I have already said, into three parts. In order that there may be a fraudulent misappropriation of property there must be first a fraudulent intention; secondly, property capable of being misappropriated; thirdly, a misappropriation.

As to what amounts to a fraudulent intention there has never been any difficulty or doubt in English law. The *Mirror* states it as plainly as it ever has been or can be stated. If the alleged offender thinks that he has a right to take the property, either because he believes it to be his own, or because he believes the owner to have consented to his doing so, he does not act feloniously, or, as the author calls it, "treacherously." This principle, accordingly, has no history.

As to the things capable of being stolen, the history of the law as deduced from the authorities I have quoted is very singular and by no means distinct. It is obvious, from the doubtful and sometimes conflicting statements in the Year-books, that the law (if so it could be called) consisted for centuries of vague impressions and floating opinions, which were differently understood at different times and by different people. The only authorities were Bracton, Fleta, Britton, the *Mirror*, and the Year-books, and even they were not and could not be printed till towards the end of the fifteenth century. The real subject for surprise is that legal traditions, such as they were, did not vary more than they seem to have done. On the whole, however, the result is as follows:—

In order that a thing might be the subject of larceny it must fulfil three conditions. It must be the subject of property; it must be moveable personal property; it must have a definite value of its own. These conditions were supposed to exclude several classes of things from the possibility of being stolen, but neither the classes of things nor the ground on which they were incapable of being stolen were at all definitely settled. Three classes of things were in one way or another decided to be incapable of being stolen, namely, things growing out of the earth, deeds, and certain animals.

Things of the first and second class, and many animals of the third class, were regarded as not being moveable chattels, but as either realty or savouring of realty. Deeds were also regarded as having no definite, independent value of their own, and the same was said of some animals. Animals also were regarded as not being in the proper sense of the word property. Each of these three principles thus applied to more than one of three classes of things, and the extracts which I have given from the Year-books show how very ill-defined the old law was down to the time of Henry VIII. The last case I have quoted, for instance, shows that in 1528 it was doubtful whether a peacock could be stolen. It was not quite clear whether it was tame or whether it had real value. The meaning of value seems not to have been the same in earlier times as it is in our own days. We should describe anything which could command a price as valuable, but in earlier times it seems to have been thought that "valuable" implied serious practical importance as opposed to mere fancy or amusement. Thus it was argued in the case of the peacock that mastiffs, hounds, and spaniels, and tame goshawks, are not the subject of larceny, "car ils sont proprement choses de plaisir plus que "de profit. Et auxi le peacock est un oiseau plus pour "plaisir que pur profit." This view was carried to an extreme length by Hales, J., who [1] is said to have "thought it no "felony to take a diamond, rubie, or other such stone (not "set in gold or otherwise), because they be not of price with "all men, howsoever some do hold them both dear and "precious." The common law upon this subject was thus extremely uncertain, both in its principles and in their application. I may conclude my account of it by noticing its further development.

The most irrational case which I have quoted from the Year-books is that of the deeds and the boxes in which they were contained. It depended on two principles: first, that the deeds "savoured" of the realty, and that the boxes were merely appurtenant to the deeds; and secondly, that the

[1] Stanford, p. 275. He says the decision is in "7 Edw. 6." As to Hales's various adventures and his suicide, see 1 *St. Tr.* 713, 714.

CH. XXVIII. deeds had no definite independent value. The Year-books do not refer to *choses* in action other than deeds. There is no decision that a bond, for instance, which did not affect land was incapable of being stolen. Coke, however, who accepted any sort of principle laid down in the Year-books as if it was a law of nature, accepted this principle and applied it to all *choses* in action whatever. In [1] Calye's case he gives an elaborate commentary on the writ in the Register which defines the liability of innkeepers for the goods of their guests. Some of its words, he [2] says, "extend to all "moveable goods, although of them felony cannot be com-"mitted, as of charters, evidences, obligations, deeds, speciali-"ties, &c." The only authorities quoted for this incidental statement are the case in the Year-book, 10 Edw. 4, 14, which has been already noticed, and which says nothing of any documents except title-deeds to land; FitzHerbert, *Indictments,* 19; and Broke, *Corone,* 155 (it should be 154); both of which are mere abridgments of the case in the Year-books. Hence the doctrine that a *chose* in action cannot be stolen, which has for its consequence the absurd conclusion that a bank note cannot be stolen, rests upon no foundation except a wholly unauthorised extension made by Coke, in treating of a different subject, of a case in the Year-books, which was itself apparently an invention of the judges in the fifteenth century, resting, moreover, upon a principle which does not apply to documents not relating to lands. In the present day it would be too late to dispute this doctrine, as it has been implicitly recognised by a great deal of legislation founded upon it.

As regards the manner in which property can be misappropriated, the cases in the Year-books, though indistinct and to some extent contradictory, all depend upon the principle explicitly stated in the *Mirror,* and recognised to a certain extent by Glanville, that a fraudulent taking is essential to larceny, and that a fraudulent conversion subsequent upon an innocent taking is merely a civil wrong. In other words, they did not treat fraudulent breach of trust as

[1] 8 Rep. 32*a* (vol. iv. p. 202, edition of 1826). [2] *Ib.* p. 206.

a crime, though the doctrine that a person who had a mere charge of a thing was guilty of felony if he fraudulently converted it was sometimes affirmed and sometimes denied, and though it had been solemnly determined that a bailee was guilty of felony if he fraudulently converted goods after previously determining the bailment. These doctrines form the foundation of a great mass of subsequent legislation, which is wholly unintelligible to a person unacquainted with them. As to the doctrines themselves, the way in which they have been developed, and the modern applications of them to facts, I must refer to [1] my *Digest*, where also will be found a statement of some minor doctrines connected with the law of theft, which, for the sake of brevity, and because they have not exercised much influence on the general form of the existing law, I have not noticed in this historical account of it.

The elaborate and intricate system which has been built upon the common law doctrines summarised by Coke and Hale is composed principally of statutes which have been passed from time to time for the purpose of supplying the defects of the common law. These statutes may be classified under three heads: 1. Those which excluded from benefit of clergy certain kinds of grand larceny. 2. Those which made it an offence of the nature of larceny to steal certain things which at common law were not the subject-matter of larceny. 3. Those which, in certain cases, treated as crimes breaches of trust which by the common law were regarded as mere civil injuries. The statutes in question were consolidated into a single act (7 & 8 Geo. 4, c. 29) in 1827, for which 24 & 25 Vic. c. 96, was substituted in 1861.

It would be tedious to mention all the statutes which were repealed and reenacted by these acts. A list of them might easily be extracted from the repealing act 7 & 8 Geo. 4, c. 27, which repeals a vast number of the old criminal statutes; but the character of the present law, and so much of its history as is of any interest, will be most conveniently

[1] *Digest*, pp. 206-219, chap. xxxv. articles 295-308.

CH. XXVIII. set forth by some observations on the arrangement and contents of the existing Larceny Act, 24 & 25 Vic. c. 96.

The arrangement of the act is so strange that a person who, with no previous knowledge of the subject, attempted to find out from it what was the English law relating to the punishment of theft, and other similar offences, would be simply bewildered. Though it contains 123 sections, and is nearly as long as the *Strafgesetzbuch* of the German empire, it contains no definition of theft, and throws no sort of light upon any of the doctrines which I have been discussing. The following observations, however, will make part, at all events, of its arrangement intelligible.

Section 2 (which reenacts, needlessly, I should have thought, section 2 of the act of 1827) abolishes, or rather reenacts the abolition of, the distinction between grand and petty larceny. The original distinction between them was that grand larceny was a capital though a clergyable felony, exceptions excepted, whereas the punishment for petty larceny was whipping. As the whole doctrine of benefit of clergy was abolished by an act (7 & 8 Geo. 4,. c. 28), which came into force on the same day as 7 & 8 Geo. 4, c. 29, it was necessary to deal in the act last named with the distinction between grand and petty larceny. Why the memory of the distinction should have been revived thirty-three years afterwards I do not know.

The third section, which punishes larceny by bailees, is put in entirely out of its place. It ought to be placed with the sections (67—87) which relate to criminal breaches of trust.

It is followed by a series of sections (4—9, both inclusive) as to the punishment of larcenies not specially punished in later parts of the act; but the effect of these sections is obscured by the intrusion of two sections (5 and 6) about indictments. The other sections provide in substance that larceny not otherwise provided for shall be punishable by three (afterwards increased to five) years' penal servitude as a maximum on a first conviction, by ten years' penal servitude as a maximum after a previous conviction for felony, and by seven years' penal servitude as a maximum after a previous conviction for certain indictable misdemeanours or after two

summary convictions. These provisions are obscured by the introduction of the expression "simple larceny," which has no definite meaning. CH. XXVIII

The rest of the act consists mainly of exceptions to common law rules, at least it is arranged with reference to them. The arrangement is shortly as follows :—

Sections 10—26 are principally exceptions from and qualifications of the common law rules about stealing animals. Sections 27—30, exceptions to the common law rules as to stealing documents. Sections 31—39, exceptions to the common law rule that land or things growing out of or fixed to land cannot be stolen. Sections 67—87 are exceptions to the common law rules that fraudulent breach of a common law trust is not a crime, and that a trustee possessed of the whole legal interest in property commits no offence when he defrauds his *cestui que* trust.

I will make some observations on each of these, and on some other parts of the act :—

First, as to the sixteen sections (ss. 10—26, both inclusive) relating to the theft of different kinds of animals, and to offences relating to deer and fish. Section 10, which punishes cattle stealing, is in substitution for a series of enactments [1] already referred to, by which the theft, first of horses and afterwards of sheep and other cattle, was made felony without benefit of clergy. The rest are exceptions to the common law rule according to which certain animals were not capable of being stolen. Thus ss. 18, 19, and 20 contain a series of special provisions about stealing dogs. They are founded mainly on 8 & 9 Vic. c. 47, which repealed and reenacted, with additions, 7 & 8 Geo. 4, c. 29, ss. 31 and 32, which had reenacted, with additions, 10 Geo. 3, c. 18, repealed by 7 & 8 Geo. 4, c. 27. The 10 Geo. 3, c. 18, was the first act which altered the common law by which dogs were not the subject of larceny. To have made dogs the subject of larceny simply would, as the law stood in 1770, have made the stealing of every dog worth more than a shilling a capital crime on the second offence. The offence, accordingly, was made a special one, punishable,

[1] See Vol. I. pp. 464-468, 473.

CH. XXVIII. on summary conviction, with fine and imprisonment. [1] Some of the other sections may be regarded as a supplement to the game laws. They apply to deer stealing, and stealing hares and rabbits in warrens. Each of these has its own separate history. Some of the statutes as to offences against deer, contained in ss. 13—16, may be traced back as far as to the reign of Richard II., and [2] give the effect of many subsequent statutes, including, amongst others, part of the well known Waltham Black Act of 1722.

Sections 27, 28, 29 and 30 practically go a long way towards repealing the monstrous rule that documents constituting evidence of a right of action, or relating to land, cannot be stolen. They do so by specifying all documents or classes of documents falling under the rule which either occurred to the draftsmen of the act, or had been excepted from the common law rule by earlier legislation. The earliest statute of this class was 8 Hen. 6, c. 12, s. 3 (1429), which punishes the stealing of records.

Sections 31—39 repeal in the same cumbrous way the common law rule that things fixed to, growing out of, or (like minerals) forming part of, the soil cannot be stolen. These eight sections enumerate everything of the kind which can be stolen, and provide special punishments for stealing them. Many sections represent many earlier enactments passed at different times, to which I need not refer. The result is that twenty-eight sections of the Larceny Act are employed in repealing in detail three general common law rules, two of which (the rule about written instruments, and the rule about things savouring of the realty) are essentially absurd, whilst the third (the rule as to stealing animals) was encumbered with needless difficulties by the extravagant severity of the common law relating to theft. It is right and necessary to have a rule distinguishing clearly between the theft of an

[1] See the effect of them collected in my *Digest*, art. 386, p. 314.

[2] The old acts as to deer stealing were 13 Rich. 2, st. 1. c. 11; 19 Hen. 7, c. 11; 5 Eliz. c. 21: 3 Jas. 1, c. 13; 7 Jas. 1, c. 13; 13 Chas. 2, st. 1, c. 10; 22 & 23 Chas. 2, c. 15 and c. 25; 3 & 4 Will. & Mary, c. 10; 5 Geo. 1, c. 15 and c. 28; 9 Geo. 1, c. 22, ss. 1 and 13. Some of these were repealed and consolidated by 16 Geo. 3, c. 30, 42 Geo. 3, c. 107; 51 Geo. 3, c. 120. These added to, repealed, and modified each other, and were themselves repealed by 7 & 8 Geo. 4, c. 27.

animal which is either tame or in confinement, and the unlawful pursuit and capture of a wild animal; but it is absurd to put in different classes the stealing of a dog worth many pounds, and which is a sort of friend to his owner, and the stealing of the dog's collar which is worth a few shillings and has no special interest. Ch. XXVIII.

The next series of sections (40—49) relate to robbery and cognate offences. [1] They are somewhat intricate. Robbery was originally a clergyable felony; but highway robbery was excluded from clergy by 23 Hen. 8, c. 1, and all robbery by 3 & 4 Will. & Mary, c. 9. When benefit of clergy was abolished, all robbery was made a capital crime by 7 & 8 Geo. 4, c. 29, s. 6. By 7 Will. 4 and 1 Vic. c. 87, s. 2, capital punishment in such cases was abolished, except in cases of robbery with wounding. The act of 1861 makes the maximum punishment of the robberies which were capital till 1861 more severe than that of other robberies. In 1863 flogging was added as a punishment for some forms of robbery by 26 & 27 Vic. c. 44, s. 1, an act so capriciously worded that, if a man beats a woman about the head with intent to rob her, he may be flogged, but not if his object is to ravish or murder her.

The crime of extorting money by threatening to accuse the person threatened of crimes, and particularly of specially infamous crimes, is associated with robbery, and has a somewhat peculiar history. By [2] several statutes passed in the course of the reigns of George I. and George II. an attempt to extort money by letters threatening to accuse persons of crimes was made punishable by transportation for seven years, or, if the threat was to murder, by death. These statutes did not, however, include verbal threats. In 1776 the actual extortion of money by verbal threat to accuse a man of unnatural practices was [3] held to be robbery. By 4 Geo. 4, c. 54, the offence of threatening with intent to extort was made punishable by transportation for life, and by later acts, which are collected

[1] Their effect is given in my *Digest of the Criminal Law*, chap. xxxix. arts. 313, 314, pp. 227, 228.

[2] 9 Geo. 1, c. 22 (the Waltham Black Act); 27 Geo. 2, c. 15; 30 Geo. 2, c. 24.

[3] R. *v.* Jones, 1 Leach, 139.

CH. XXVIII. in and [1] represented by 24 & 25 Vic. c. 96, ss. 44, 46, 47, 48, 49 and 50, the whole subject is elaborated in a way shown by experience to be necessary. These statutes have practically superseded the principles laid down in R. *v.* Jones, and subsequent cases.

Sections 50—59, both inclusive, deal with burglary and house-breaking. Burglary was a crime at common law derived from the ancient [2] "Ham-socn, Ham-fare, domus invasio." Its definition involved several intricacies which I need not notice here. The most characteristic element of the offence is that it must be committed at night, *i.e.* between 9 P.M. and 6 A.M., and its history closely resembles that of robbery. It was originally a clergyable felony. By 18 Eliz. c. 7 (extended to accessories by 3 & 4 Will. & Mary, c. 9), it was excluded from clergy. By 7 & 8 Geo. 4, c. 29, s. 11, it was subjected to capital punishment. This was altered by 7 Will. 4 and 1 Vic. c. 86, s. 3, which repealed capital punishment for this offence unless it was attended with certain aggravations, and this provision was repealed by 24 & 25 Vic. c. 96, s. 52, which subjected burglary in all cases to secondary punishment. The cognate offence of housebreaking has been made the subject of a surprising number of minute distinctions, the nature and history of which are not worth the trouble of relating or stating.

Several sections which follow (60—66) punish special forms of larceny, such as stealing in shops and from ships, which were formerly felonies without benefit of clergy, and which, having been originally capital, are still punished more severely than common larcenies.

The next division of the act contains twenty sections (67—87, both inclusive), which, taken together, represent the exceptions which have been made to the general rule of the common law that a fraudulent breach of a common law trust is only a civil injury and not a crime.

The way in which the law was developed seems to me to have some general interest, marking, as it does, a gradual change in the national manners and habits of life.

[1] See my *Digest of the Criminal Law*, art. 314.
[2] *Leges Henrici Primi*, lxxx. 10, 1.

The doctrine of the common law was that fraudulent breach of trust is not a crime, or, if the same thing is more technically stated, that a felonious taking is an essential part of the definition of theft. I have given the early history of this state of the law. It may have been based on the sentiment that against open violence people ought to be protected by law, but that they could protect themselves against breaches of trust by not trusting people,—a much easier matter in simple times, when commerce was in its infancy, than in the present day. However this may have been, the inconvenient and indeed absurd consequences of the doctrine gradually revealed themselves practically, and as they did so attempts were made to obviate them as they arose by a series of statutory exceptions. In the first place, the authors of the common law themselves, as appears from the cases in the Year-books already referred to, shrank from carrying the doctrine out to its extreme consequences. The doctrine appears to have been that the taking must be a taking out of the possession of some person entitled to it. The distinction between a charge and possession readily suggested itself. A man who tells his servant to hold his horse for him, or who allows his guest to drink out of his cup in his presence, was felt to retain his control over the horse or the cup as much as if he held the bridle or the cup in his own hand, and it was accordingly asserted that if the servant in the one case, or the guest in the other, made away with the thing in his charge, he was guilty of theft. It was, however, as I have shown, a moot point how far this went, and whether a servant who had property in his possession for his master, as distinguished from having a mere charge of it, was guilty of theft or not. [1] This doctrine was thoroughly established and acted on in many cases all through the eighteenth century, and a similar series of cases decided that, if a man intending to steal fraudulently induces the owner of goods to intrust him with the possession of the goods and then steals them, it is felony.

The doubts felt as to the case of servants led to the statute

[1] Cases collected in 1 Hawk. *P. C.* 144, 145.

CH. XXVIII. 21 Hen. 8, c. 7, passed in 1529, which recited the doubt, and made it felony in any servant, not being an apprentice or under eighteen years of age, to embezzle any money or chattel intrusted to him by his master to be kept for his use. At a much later date[1] a doubt whether a lodger had a special property in the furniture of his lodging having been decided in favour of a person who had stolen such furniture, an act was passed making such thefts felonies for the future. Some special acts were also passed having reference to [2] servants of the Post Office and [3] Bank stealing things committed to their charge; and a number of statutes were passed inflicting punishments, generally upon a summary conviction, upon servants in particular branches of trade, tailors, weavers, &c., who embezzled, or as it was generally called, "purloined," the property of their masters.

The first general enactment, however, which altered the old common law rule extensively was 39 Geo. 3, c. 85, which was passed in consequence of the decision of [4] Bazeley's case. Bazeley was a clerk in Esdaile's bank. He received as such a note for £100, which it was his duty to put to the credit of a customer who paid it in. Instead of doing so, he applied it to his own purposes. The case, strange as it appears, seems to have been considered as a new one. There is a most elaborate report of the argument, but hardly any cases or authorities upon it were referred to, and the judges decided that it was not within either the common law or any of the statutes then in force. I cannot understand how the question whether such a transaction was or was not criminal can have remained undecided so long. Possibly the excessive severity with which a mere debtor could be treated, then and long afterwards, may have had something to do with it. Bazeley, for instance, clearly owed Esdaile's bank £100, and if his masters wished to punish him they could arrest him on mesne process, in which case he would not have found it easy to get bail. When they got judgment they could imprison him on a *ca sa* for an indefinite time or till payment. However this

[1] R. *v.* Meers, 1 Shaw, p. 50; 1 Hawk. *P. C.* p. 146; 3 & 4 Will. & Mary, c. 9.

[2] 9 Anne, c. 10; 5 Geo. 3, c. 25; 7 Geo. 3, c. 50.

[3] 15 Geo. 2, c. 13.

[4] Leach's *Crown Law*, p. 835.

may have been, the case was the occasion of 39 Geo. 3, c. 85, which was repealed by 7 & 8 Geo. 4, c. 27, and reenacted by 7 & 8 Geo. 4, c. 29, s. 47. These statutes enacted that if any clerk or servant, or person employed in the capacity of a clerk or servant, should, *by virtue of his employment*, receive or take into his possession any chattel, money, or valuable security for, or in the name of, or on account of, his master, and should fraudulently embezzle the same, he should be deemed to have feloniously stolen the same from his master, although such chattel, money, or security, was not received into the possession of the master otherwise than by the actual possession of the offender. The offence was punishable by fourteen years' transportation. This provision is reenacted with the omission of the words italicised by 24 & 25 Vic. c. 96, s. 66.

This enactment introduced much intricacy into the law. In the first place, though the statute expressly says that the offender is to be deemed to have stolen the property embezzled, it has been held that a person accused must be indicted for embezzlement and not for theft. This was, of course, necessary when the punishments for the two offences were different; but now that the punishment is the same there is no reason whatever for it. The distinction between the two offences is this. If the clerk first reduces the bank note into his master's possession, as by putting it in his master's till, and then takes it out and carries it away, he commits theft. If he misappropriates it before putting it into his master's till, he commits embezzlement. In many cases it is extremely difficult to say beforehand whether on the evidence the offence charged will turn out to be larceny or embezzlement.

This distinction caused failures of justice till it was enacted in 1857 that if upon a trial for embezzlement or theft the accused appeared to have committed theft or embezzlement he should not be entitled to an acquittal. This was repealed and reenacted with some additions by 24 & 25 Vic. c. 96, s. 72. The useless distinction, however, is still kept up, for the offender must be convicted of the offence which he is proved to have committed, and if it was wholly uncertain which of the two he committed, he might have to be acquitted of both.

CH. XXVIII.

The distinction has led to a long series of cases which elaborately distinguish between embezzlement and theft. They turn upon discussions as to the nature of possession, which are as technical and unsatisfactory as all attempts to affix a precise meaning to a word which has no precise meaning must necessarily be.

The words "clerk or servant" have led to an equal or greater number of cases, the difficulty in this case being to distinguish between a servant and an agent, a difficulty analogous to, and hardly less than, that of attaching a perfectly precise meaning to the word "possession."

Lastly, the words "in virtue of his employment" introduced an element of uncertainty into the law which has been removed by their omission.

Twelve years after Bazeley's case occurred the case of [1] R. *v.* Walsh. Walsh was a stockbroker, who acted for Sir T. Plumer. Sir T. Plumer gave Walsh a cheque for £22,200, to be invested in Exchequer Bills. Walsh paid the cheque into the bank on which it was drawn, and drew out the proceeds in bank notes, a large part of which he applied to his own purposes. He was indicted for stealing the bank notes and certain other securities representing other parts of Sir T. Plumer's cheque. It could not be suggested that this was embezzlement, because Walsh was neither a clerk nor a servant, and because he had received the money to be invested for Sir T. Plumer, not to be paid to him, and the question whether it was larceny was [2] argued with extreme elaboration. No judgment was given, but the prisoner was released, no doubt upon the ground that the property in the specific bank notes received by Walsh never was in Sir T. Plumer, but passed to Walsh, subject to a contract to invest them in Exchequer Bills for his employer, which contract might or might not make him a trustee of them for Sir Thomas in such a sense that if he had suddenly died his executor would be restrained from parting with them, or that if he retained them his creditors would not be allowed to take them otherwise than as trustees.

[1] 4 Taunton, p. 258.

[2] By Scarlett, afterwards Lord Abinger, for the prisoner; and Gurney, afterwards Baron Gurney, for the Crown.

This case led to the passing of the act 52 Geo. 3, c. 63 ([1] introduced by Mr. Drummond), which applied specifically to bankers, merchants, brokers, attornies, and "agents of any "description whatever." It punished with fourteen years' transportation every such person who should (1) sell or otherwise apply to his own use any security deposited with him for safe custody, or for any special purpose; (2) apply to his own use any sum of money or security deposited with him, with an order in writing signed by the depositor to invest such money in any particular way, or for any other purpose specified in the order.

The two definitions do not appear to be altogether distinct. If a bank note for £100 were deposited with a solicitor to settle an action, and he were to misappropriate it, s. 1 would apply if there were no written direction as to its application, and s. 2 if there were such a direction. I suppose the first section applies to special purposes, similar to safe custody, and the other to special purposes, similar to investment; but I hardly see what special purpose similar to safe custody there can be. An agent may be intrusted with a thing either to keep it for the owner or to dispose of it for the owner; what third purpose there can be for which a thing can be deposited with an agent I do not understand. If the agent is to keep the money or security safely for a certain time, or till a particular event happens, and is then to dispose of it, it appears to me that till the time comes, or the event happens, he is intrusted for safe custody and afterwards for disposal.

These provisions were reenacted, with a little condensation in language, but substantially in the same words, by 7 & 8 Geo. 4, c. 29, s. 49, which, however, for some reason, inverts their order; section 2 of the act of George III. forming the first part, and s. 1 the second part, of s. 49 of the act of George IV. A section was added in this act (s. 51), which contained provisions relating to the fraudulent pledging by factors and agents, intrusted for the purposes of sale with goods or documents, of title to goods.

It is important to observe that these enactments did not

[1] See Sir R. Bethell's speech, May 21, 1857, 145 Hansard, 680.

CH. XXVIII. deal with the principles of the common law. They only put fraudulent breaches of trust by agents, and in particular by merchants, bankers, brokers, attorneys, and factors, on the same footing as embezzlement by servants. The old common law principle still protected all other fraudulent breaches of trust, as, for instance, larceny by a bailee. If a carrier stole a parcel of jewellery intrusted to him to carry, he committed no crime under these acts unless he broke bulk.

Still less did the acts deal with misconduct by trustees in whom was vested the whole legal interest in property misappropriated. If a trustee under a marriage settlement applied to his own purposes the whole of the settlement fund, he could not be punished under these acts.

This state of the law was to some extent remedied by the enactment, in the year 1857, of 20 & 21 Vic. c. 54. This act was occasioned by a variety of frauds committed by trustees properly so called, some of which had come to light in connection with the trial of the directors of the British Bank. In asking leave to bring it in, Sir Richard Bethell, then Attorney-General, gave an account of the principles on which it proceeded, in which he observed, amongst other things, that the best remedy for the defects of the law would be to redefine theft, but that he did not feel equal to such an undertaking. The speech seems to me to show an absence of any due appreciation of the importance of the distinction between trusts which do, and trusts which do not, vest in the trustee the whole legal title to the subject matter of the trust. It would have been no great effort for such a man as Sir Richard Bethell, if he had cared to acquaint himself with the subject, to frame a definition of theft which would include all cases of theft by persons intrusted with property as trustees at common law. Such a definition would be arrived at by making a fraudulent conversion the essence of the offence, instead of a fraudulent taking. The case of trustees regarded by the common law as absolute proprietors of the property intrusted to them might have been specially provided for.

[1] This act in its final form provided, by ss. 1 and 17, for

[1] I have traced the bill in Hansard through its various stages. It is surprising how little is to be learnt about it from reading the various discussions

the punishment of trustees on express trust, created by a deed, will, or instrument in writing, their heirs and personal representatives, executors, and administrators, liquidators, and assignees, who, with intent to defraud, should convert or appropriate to their own use the subject-matter of their respective trusts. CH. XXVIII.

Section 2 provided for the punishment of agents misappropriating property intrusted to them for safe custody; section 3 for the punishment of persons making a fraudulent use of powers of attorney; and section 4 provided that a fraudulent conversion by a bailee of property bailed to him should be larceny though he might not break bulk. The rest of the act related to offences committed by the directors of public companies, which I shall consider under a different head.

Four years afterwards this act was repealed and its provisions [1] were reenacted in 24 & 25 Vic. c. 96, the act under consideration. In this act the sections taken from the act of 1857 are mixed up in a most confusing way with the sections taken from the act of 1827. The result is that two of the sections of the act of 1861 practically reproduce each other, as appears from the comparison made in the footnote.[2]

which took place. No single member appears to me to have fully studied it in all its bearings. In particular, its relation to the act 7 & 8 Geo. 4, c. 29, is not discussed at all, though one member hinted at the importance of comparing the two.

[1] The correspondence between the sections of the two acts is as follows :—

Act of 1857 (20 & 21 Vic. c. 54).	Act of 1861 (24 & 25 Vic. c. 96).
S. 1 (fraudulent trustees)	= S. 80.
S. 2 (fraudulent agents)	= S. 76.
S. 3 (fraudulent use of powers of attorney)	= S. 77.
S. 4 (larceny by bailee)	= S. 3.
Ss. 5, 6, 7 (frauds by directors, &c., of companies)	= Ss. 81, 82, 83, 84.

[2] The two sections are as follows (I omit from s. 75 words relating to the fraudulent use of powers of attorney) :—

S. 75.

"And whosoever, having been in- "trusted, either solely, or jointly with "any other person, as a banker, mer- "chant, broker, attorney, or other "agent, with any chattel or valuable "security . . for safe custody, or for "any special purpose, without any

S. 76.

"Whosoever, being a merchant, "broker, attorney, or agent, and "being intrusted, either solely, or "jointly with any other person, with "the property of any other person "for safe custody, shall, with intent to "defraud, sell, &c., or in any manner

CH. XXVIII.

Section 75 is taken from the act of 1827, and section 76 from the act of 1857, but why the equivalent of section 76 was inserted in the act of 1857, or what cases it can apply to which are not provided for by section 75 I cannot suggest. The matter was much discussed in the very recent case of R. *v.* Newman, *L. R.* 8 Q. B. D. 706, but I for one was unable to see any substantial difference between the two enactments.

These provisions contain the present law as to criminal breaches of trust. They constitute a series of exceptions to the old common law so wholly inconsistent with its principle as to make it at once unintelligible and, so far as it still exists, a mere incumbrance and source of intricacy and confusion. The law as it now stands may be thus summarised.

The fraudulent misappropriation of property is not a criminal offence, if the possession of it was originally honestly acquired, except in the case of

S. 75.	S. 76.
" authority to sell, &c., shall, in violation of good faith, and contrary " to the object or purpose for which " such chattel, &c., shall have been " intrusted to him, sell, &c., or in " any manner convert to his own use " or benefit, or the use or benefit of " any person other than the person " by whom he shall have been so intrusted, such chattel or security, " shall, &c." (seven years' penal servitude as a maximum).	" convert or appropriate the same, or " any part thereof, to and for his own " use or benefit, or the use or benefit " of any person other than the person " by whom he was so intrusted, shall, " &c." (seven years' penal servitude as a maximum).

The points in which these sections differ are minute and unimportant. S. 75 applies to an intrusting "for safe custody, or for any special purpose." S. 76 is confined to an intrusting "for safe custody." S. 75 applies to "chattels "and valuable securities" only. S. 76 to "property," which includes (see s. 1) real property, and "and also any property into or for which the same "may have been converted or exchanged, and anything acquired by such con- "version or exchange, whether immediately or otherwise." So far, s. 76 is wider than s. 75, but s. 75 includes "valuable security," which words do not occur in s. 76; and "valuable security" is elaborately defined in s. 1, and includes, for one thing, "any document of title to lands," which again includes every sort of document relating to any interest in realty. As land itself could not be "intrusted for safe custody" to any one, the effect of this is to make the "chattel and valuable security" of s. 75 almost exactly coincident with "property" in s. 76, except that "property" includes the proceeds of property and the proceeds of the proceeds. S. 75 applies to misappropriations "in violation of good faith." S. 76 to misappropriations with "an intent to "defraud," expressions which are obviously synonymous, as neither could exist without the other. In short I think it is almost impossible to put a case which would fall under the one section and would not fall under the other. At all events, no well-marked class of cases can be specified to each of which one section applies.

(1) Servants embezzling their masters' property, who were first excepted in 1799.

(2) Brokers, merchants, bankers, attorneys, and other agents, misappropriating property intrusted to them, who were first excepted in 1812.

(3) Factors fraudulently pledging goods intrusted to them for sale, who were first excepted in 1827.

(4) Trustees under express trusts fraudulently disposing of trust funds, who were first excepted in 1857.

(5) Bailees stealing the goods bailed to them, who also were first excepted in 1857.

The original rule is tacitly assumed, and all the exceptions to it are expressly reenacted in a wider form in the Larceny Act of 1861.

These exceptions to the rule cover, no doubt, all the most important cases to which it applied; but classes of cases to which it applies, and which are of considerable importance, still remain. There are various ways in which a man may come innocently into the possession of his neighbour's goods without being either a servant, a broker, merchant, banker, attorney or other agent, a factor, a bailee or a trustee. [1] For instance, the acting treasurer of a missionary society, having moneys which it was his duty to deposit or invest, converted them to his own use. As he was not a bailee of the specific coins received this was held to be no offence. [2] The intricacies of the law as to the cases in which a person who finds goods and keeps them is and is not guilty of theft is a remarkable instance of the way in which a bad principle injures the law, notwithstanding the exceptions made to it.

One further alteration in the law closely connected with this subject has been made. At common law a co-owner could not steal property from his other co-owners. This was altered in 1867 by 31 & 32 Vic. c. 116, commonly called Mr. Russell Gurney's Act. It was passed in consequence of cases occurring in which trade unions had been robbed with impunity by persons in their employment, who were also members of the body, and so co-owners of its funds.

[1] R. v. Hassall, L. and C. 58, and see many other illustrations in my *Digest*, art. 304, p. 216.

[2] *Digest*, pp. 214, 215, art. 302.

CH. XXVIII. These are the principal enactments by which the different forms of the crime of theft are now defined and punished. Most of, though not quite all, the sections of the Larceny Act which I have left unnoticed relate to procedure; the rest relate to offences of which it is unnecessary to say anything in this place.

Upon the whole, the existing law of theft may be said to be made up of two principal parts. First, a large number of enactments providing intricate and jealously limited exceptions to the different common law principles of which I have traced the history. The exceptions have nearly, but not quite, blotted out every one of the rules. Secondly, there are a number of other provisions punishing special aggravations of the offence of theft. Most of these were originally felonies without benefit of clergy, but by degrees they have been reduced to cases in which a somewhat more severe maximum punishment may be awarded than is lawful in other cases of theft.

One more offence connected with theft is punished by the Larceny Act. This is the obtaining of property by false pretences. In order to explain its nature and place in the general theory of the crime it is necessary to return for a moment to one of the common law rules which I have already noticed. It was held at a very early period in the history of the law that, though a wrongful taking is essential to theft, it is nevertheless theft to obtain the possession of a thing by fraud and then to appropriate it. A asks B to allow him to try B's horse, and having got leave to mount for that purpose rides off with the horse. Here the taking is permitted by B, and is so far lawful, but, inasmuch as the leave of B is obtained by a fraud, the taking under the fraud is regarded as wrongful, and the subsequent conversion as theft. If, however, A obtained from B by a false pretence the property in the horse, and not merely the possession of him, the act of taking was not regarded as theft. There obviously is a distinction, though it is by no means a broad or a clear one, between the two offences; but the common law doctrine drew the line in the wrong place. If it had said to misappropriate the property of another is theft, whether at the time of

the misappropriation the property is or is not in the owner's possession; but to persuade the owner by fraud to transfer his property is obtaining property by false pretences and not theft, the distinction would have been just and plain. The distinction between the fraudulent conversion of property the possession of which was obtained by fraud, and the fraudulent acquisition of property as distinguished from possession, is hard both to understand and to apply to particular states of fact. [1] Cheating was, and still is, an offence at common law. Its essence is defrauding by means which are or may be injurious to the public generally, as *e.g.* by the use of a false weight or measure. This did not apply to false representations of facts made to individuals. Hence the obtaining of goods by false pretences was, in 1757, made a misdemeanour by 30 Geo. 2, c. 24, s. 1.

In 1827 this act was repealed by 7 & 8 Geo. 4, c. 27, and re-enacted by 7 & 8 Geo. 4, c. 29, s. 53. This enactment, with some additions intended to supply defects in the law which had been discovered by experience, are now represented by [2] sections 88, 89, and 90 of the Larceny Act of 1861. Many decisions on their meaning have been found necessary. The words, "whosoever shall by any false pretence obtain "from any other person any chattel, money or valuable "security with intent to defraud," seem simple enough, but they are obviously open to an interpretation which would make any dishonest breach of contract criminal. A man who buys goods which he does not intend to pay for may be said to obtain them by a false pretence of his ability and intention to pay. The courts, however, soon held that this was not the meaning of the statute, and that in order to come within it a false pretence must relate to some existing fact. This is closely analogous to the element of public harm involved in the definition of cheating. A mere lie told with an intent to defraud, and having reference to the future, is not treated as a crime. A lie alleging the existence of some fact which does not exist is regarded as a crime if property is obtained by it. A variety of questions have

[1] For the definition of the offence and illustrations, see my *Digest*, Art. 338, p. 254.

[2] See my *Digest*, Articles 329-332, pp. 246-250.

CH. XXVIII. been raised upon the meaning of the different words in the section, for a statement of which I refer to my *Digest*. The oddest of them is that the terms, "chattel, money, or "valuable security," do not include things which at common law were not the subject of larceny, and that therefore it is not an offence to obtain two pointers worth £5 each by a false pretence.

One point which deserves notice as to the offence of obtaining goods by false pretences is the difficulty of distinguishing it from that form of larceny in which goods are misappropriated after the possession as distinguished from the property has been fraudulently obtained. If A by a false pretence gets B to let him try a horse and rides off with the horse, the offence is theft. If he, by the same false pretence, gets B to sell him the horse on credit and goes off without paying for him, this is obtaining goods by false pretences. On an indictment for the one offence and proof of the other, an acquittal followed. So many failures of justice arose from this, that it was enacted in 1827, and re-enacted in 1861, that a person indicted for obtaining goods by false pretences should not be acquitted if his offence turned out to have been theft; but a man who is indicted for theft must be acquitted if his offence turns out to be obtaining goods by false pretences. This is a curious little defect in the law, and I am unable to understand why such an obviously one-sided reform was made.

Such is the English law upon the subject of theft and cognate offences. The Criminal Code Commissioners of 1879 proposed to simplify it greatly. In the first place, they proposed to remove all the old common law rules as to things which are not the subject of larceny by enacting as follows: All inanimate things being the property of any person, and either being moveable or which might be made moveable, except things growing out of the earth under a shilling in value, were to be capable of being stolen. This would have superseded the common law rules as to fixtures, things growing, minerals, and documents valuable only as evidence of rights of action. The reason why things growing under the value of a shilling were excepted was the harshness of

exposing every person to be treated as a thief who picked a flower or cut a stick from a hedge. The law as to summary convictions for stealing fruit, flowers, &c., under the value of a shilling, was left unaltered. CH. XXVIII.

As to animals there is a difficulty in the nature of things which the Commissioners proposed to deal with as follows:—All tame living creatures were to be capable of being stolen except tame pigeons which were to be capable of being stolen only so long as they were in a dovecote or on their owner's land. To shoot a pigeon when trespassing and to take its body was, it was thought, at the very worst, an act to be treated as a civil trespass.

As for wild animals it was proposed that such as are not commonly found at liberty in England should be the subjects of larceny, whether in confinement or not; but that such as are commonly found at liberty in England should be the subjects of larceny so long only as they were kept in captivity. If a valuable wild beast, say a giraffe, escaped from a menagerie, or from a dealer in wild beasts [1] it would be absurd to say that he had regained his natural freedom, and might be taken by any one who could catch him. If on the other hand a hare or a badger got away from some person who had kept it in confinement it would be equally absurd to deny that it had ceased to be property. It was considered that these enactments would make the law correspond with what would be regarded as the natural anticipations of mankind.

Theft itself was defined as "the act of fraudulently and "without colour of right taking, or fraudulently and without "colour of right converting to the use of any person anything "capable of being stolen, with intent to deprive the owner "permanently thereof, or to deprive any person having any "special property or interest therein permanently of such

[1] One of the police magistrates not long ago had a man summoned before him for being unlawfully in possession of a crocodile. It had been imported and had escaped, and the possessor of it said he had caught it swimming in the Thames. In strictness of law I suppose it was the second captor's property, but the magistrate sensibly advised the captor to give it up to its owner on receiving a fair compensation for his trouble. Some curious questions might have been raised if the man had been committed for trial.

CH. XXVIII. "property or interest." This would have cut away all the technical distinctions which I have explained at so much length as to the necessity for a felonious taking, and have substituted a distinct and simple principle, requiring little explanation or illustration, and reasonable in itself, for a principle so unreasonable in itself as to have been practically eaten up by exceptions inconsistent with it.

The long series of provisions as to fraudulent breaches of common law trusts was proposed to be dealt with on the following principles. The difficulties which were the source of so many exceptions and so much intricacy at common law were twofold. First, the difficulty arising from the fact that the original taking in the case of agents was not felonious; secondly, the difficulty that in many cases the agent holds no specific coin or property for his principal, but only the proceeds of such property, or the produce of such proceeds. The extension of commerce since the common law took its present shape has been so enormous, that personal property has, to a considerable extent, lost its identity, and become mutable to the highest degree in its form. A man may frequently be entrusted with money which he has a right to deal with in a variety of ways, as, for instance, by changing it for other money, by paying it into a bank, by investing it in the funds, &c., but which he is not entitled to treat as a mere debt due to his principal. For instance, A. pays his solicitor B. money, with a direction to invest it for him when a suitable occasion occurs. A. does not by this mean to prevent B. from paying it into a bank, from investing it in Exchequer bills, or even from putting it into the funds, but he does mean that that money, or its equivalent, shall be forthcoming for the purpose of investment when required, and shall not be treated by B. as a mere debt due to A. If B. appropriates the money to his own purposes and deceives A. by paying the interest, pretending to have invested it, B. would usually and properly be regarded as a thief. Even now, as I have shown, the law punishes such conduct, though incompletely and indistinctly.

The following were the provisions which the Criminal Code Commissioners proposed on the subject. I think they would

have met every case which might be said to amount to theft morally, and yet to have applied to no cases of debt. CH. XXVIII.

"SECTION 249.—THEFT BY AGENT.—Every one commits a theft who, having received any money valuable security " or other thing whatsoever on terms requiring him to ac- " count for or pay the same or the proceeds thereof or any " part of such proceeds to any other person, though not " requiring him to deliver over in specie the identical money " valuable security or other thing received, fraudulently con- " verts to his own use or fraudulently omits to account for " the same or to account for or pay any part of the proceeds " which he was required to account for or pay as aforesaid.

" Provided that if it be part of the said terms that the " money or other things received or the proceeds thereof shall " form an item in a debtor and creditor account between the " person receiving the same and the person to whom he is to " account for or pay the same, and that such last-mentioned " person shall rely only on the personal liability of the other " as his debtor in respect thereof, the proper entry of any part " of such proceeds in such account shall be deemed a suffi- " cient accounting for the part of the proceeds so entered.

"SECTION 250.—THEFT BY PERSON HOLDING POWER OF " ATTORNEY.—Every one commits a theft who, being entrusted " either solely or jointly with any other person with any power " of attorney for the sale mortgage pledge or other disposition " of any property real or personal, whether capable of being " stolen or not, fraudulently sells mortgages pledges or other- " wise disposes of the same or any part thereof, or fraudulently " converts the proceeds of any sale mortgage pledge or other " disposition of such property or any part of such proceeds, to " some purpose other than that for which he was entrusted " with such power of attorney.

" SECTION 251.—THEFT BY MISAPPROPRIATING PROCEEDS " HELD UNDER DIRECTION.—Every one commits theft who, " having received either solely or jointly with any other " person any money or valuable security or any power of " attorney for the sale of any stock or shares whatever, " with a direction that such money or any part thereof or " the proceeds or any part of the proceeds of such security

CH. XXVIII. "or such stock or shares shall be applied to any purpose or "paid to any person specified in such direction, in violation "of good faith and contrary to such direction, fraudulently "applies to any other purpose or pays to any other person "such proceeds or any part thereof:

"Provided that where the person receiving such money "security or power of attorney and the person from whom he "receives it deal with each other on such terms that all "money paid to the former would in the absence of any such "direction be properly treated as an item in a debtor and "creditor account between them, this section shall not apply "unless such direction is in writing."

These were the main alterations which the Commissioners proposed in the law. Shortly, the effect of them would have been to include under the definition of theft all thefts at common law, and all criminal breaches of common law trusts now punished under the several statutes relating to larceny by bailees, embezzlement, frauds by agents, and frauds by factors. The definition would also have covered all the fraudulent breaches of common law trusts which at present escape punishment under the old principle, which is still law notwithstanding the numerous exceptions which have been made to it. The offence of criminal breach of trust by trustees, who at common law are full legal owners, and the offence of obtaining goods by false pretences were provided for by separate sections re-enacting the existing law. These alterations would have greatly shortened the law, and freed it from all avoidable technicality. They would have made it intelligible, and brought it into harmony with the moral sentiments of the community. The rest of the law of theft the Commissioners would have re-enacted with some few alterations and additions. The Draft Code contained separate special provisions for stealing wills, post letters, &c., stealing by servants of the bank, by servants generally, stealing from the person, stealing cattle, stealing goods in process of manufacture, stealing from ships, stealing on railways, and stealing by picklocks or other instruments. All these offences, except the two last, are special offences under the present law, for one or other of the reasons already given. The two last are

new, and were suggested by article 384 of the *Code Pénal*, and article 243 (4) of the *Strafgesetzbuch* of the German empire.

This part of the Commissioners' draft appears to me to be needlessly minute, and to show an undue anxiety to avoid changes in the existing law which might greatly simplify it. Historically, the numerous special provisions as to stealing particular things represent the numerous statutory exceptions which from time to time were made to the common law rules which declared that certain classes of things should not be the subject of larceny at all, and to the common law rule that grand larceny was a clergyable offence. When it was thought right that people should be hung or be liable to be hung for sheepstealing on their first offence, it was necessary to pass a special act for the punishment of sheepstealing. When it was thought right that the stealing of dogs should be punishable, notwithstanding the common law rule which practically treated as theft only the theft of animals used for food or labour, a special statute had to be passed about dogs; but all these special provisions seem to become needless when rational general rules are laid down as to things which can be stolen and as to the way in which theft is to be punished. When I drew the Draft Code of 1878, I thought that the law might be not only simplified but greatly improved by taking the value of the things stolen as the guide to the maximum punishment of theft, when theft was not accompanied by violence or extortion, so as to make it robbery, or by house-breaking, nocturnal or otherwise. I suggested that the maximum punishment for stealing things under the value of £100 should be seven years' penal servitude, under the value of £500 fourteen years' penal servitude, and above that value penal servitude for life. My colleagues did not share this view; they thought that the value of the thing stolen was no test of the moral guilt or public danger of the theft, and that it was better to take the law as it stood. Though overruled I was not convinced. The existing law appears to me so capricious, that if it were not very carefully administered, and if the system of minimum punishments had not fortunately been removed, it would produce gross injustice. The following

CH. XXVIII. are a few instances:—A., by an artful conspiracy in which several people take part, and which is carefully prepared for months beforehand, steals from a railway luggage van gold worth several thousand pounds. The utmost punishment which can be awarded for this offence is five years' penal servitude. B. steals an old coat from a barge in a canal. He is liable to fourteen years' penal servitude. C. steals a post letter containing half a sovereign. He is liable to penal servitude for life. Practically A. would be sentenced to five years' penal servitude; his sentence ought to be heavier, for his crime presents every element of aggravation. B. would be sentenced probably to three months' imprisonment if there was nothing else against his character. C. would be sentenced to penal servitude if he was a clerk in the Post Office. If not, he would probably be imprisoned for a longer or shorter time according to circumstances. A law which admits of such anomalies is to say the least entitled to no particular respect. The alteration which I proposed does represent a principle, indeed it represents several principles. It is true that the value of a stolen article is no test of the moral guilt of the theft, but this is not the only matter to be considered in fixing maximum punishments. The temptation to steal is usually proportional to the amount to be gained by stealing. This temptation ought as far as possible to be counteracted by a corresponding increase in the punishment. When the property is specially valuable, it is usually guarded with special care, and the attempt to steal it is made by specially experienced and ingenious thieves, who usually conspire for the purpose. This, again, is a reason why such offences should be liable to be punished with special severity. The reduction of a great number of intricate sections to one section, supplying a scale of maximum punishments easily understood and remembered, would be another reason for such a provision. I do not think, however, that the question is of much practical importance. It is only in very exceptional cases that the present maximum punishments are not sufficiently severe.

I now propose to compare the English law upon theft with the laws of France and Germany.

The provisions of the French *Code Pénal* with respect to theft resemble those of our own law closely, though they differ from them by the absence of the rules as to the classes of things which are not regarded as capable of being stolen. The following short summary of the French law [1] by M. Hélie might serve as a summary of our own:—"Les jurisconsultes "Romains avaient fixé les caractères élémentaires de ce délit, "[2] '*fur est qui dolo malo rem alienam contrectat*' (Art. 379), "traduit fidèlement cette definition. 'Quiconque a soustrait "frauduleusement une chose qui ne lui appartient pas est cou-"pable de vol.' Trois conditions sont donc nécessaires pour "qu'il y ait vol; il faut qu'il y ait eu soustraction d'une "chose quelconque, que cette soustraction soit frauduleuse, "enfin que la chose soustraite appartienne à autrui. Nous "allons examiner ces trois éléments du délit. CH. XXVIII.

"*Soustraction.* Le premier élément du délit est la sous-"traction, c'est-à-dire l'enlèvement de la chose. Jusqu'à cet "enlèvement l'agent lors même qu'il a mis la main sur cette "chose peut se désister, mais le délit est accompli aussitôt "qu'elle est enlevée. Les arrêts décident en conséquence, que "pour soustraire, il faut prendre, enlever, ravir, et que la "soustraction n'existe que lorsque la chose a été appréhendée. "Ainsi il n'y a pas de soustraction lorsque la chose a été volon-"tairement remise à l'agent, soit sous la condition implicite "d'une restitution immédiate, soit même par erreur, et que "celui-ci en a profité pour s'en emparer frauduleusement, "puisque la remise volontaire de la chose quelque soient son "motive et sa durée exclut l'appréhension, l'enlèvement, la "soustraction. [4] Mais si la remise a été surprise, si elle n'est

[1] *Pratique Criminelle*, ii. p. 423. This is an abridgement of the longer work, *Théorie du Code Pénal*, in which the subject is treated at great length.

[2] Of this passage it is said in the larger of the two works above referred to, that "Cette règle qui établit fidèlement les trois éléments essentiels du vol "rejetée par Justinien demeura longtemps sans autorité; la définition des "Pandectes" (also of the Institutes) "longuement développée par les docteurs "était devenue un principe de notre ancien droit."—*Théorie du Code Pénal*, v. 30.

[3] The English law differs from this as to cases in which the offender has a mere charge or custody as distinguished from a possession, and as to mistakes. The case of a charge was referred to above, p. 151; as to mistakes see R. *v.* Middleton, L. R. 2 C. C. R. 58.

[4] This is exactly the same as the rule of English law that where custody or possession of a thing is obtained by fraud, the subsequent conversion of the

CH. XXVIII. " qu'une manœuvre frauduleuse qui prépare et facilite sa soustraction, elle se confond avec celle-ci, et loin de l'exclure, " elle en devient un élément.

" Du principe qu'il n'y a pas de vol sans une soustraction, " sans une appréhension et un enlèvement de la chose, il " résulte : 1. Que le vol ne peut atteindre que les choses " mobilières. 2. Qu'il ne peut avoir pour objet une chose " incorporelle un droit. 3. Que toutes les fraudes qui tendent " à s'emparer des choses d'autrui par d'autres modes que la " soustraction ne rentrent pas dans la classe des vols, tels sont " le créancier qui à l'insu du débiteur applique à son usage " personelle l'objet qu'il a reçu en nantissement, le dépositaire " qui se sert des choses reçues en dépôt, le commanditaire ou " l'emprunteur qui vendent des objets prêtés ou loués.

[1] " Faut-il considérer comme une soustraction le fait de " retenir frauduleusement un objet trouvé par hasard ? Il y " a lieu de distinguer si l'intention de s'approprier l'objet est " née au moment même où il était trouvé, ou si cette intention n'est survenue que postérieurement à cette main mise. " Dans la première hypothèse la jurisprudence décide qu'il y a " soustraction, puisque l'agent s'est emparé avec le dessein " immédiat de se l'approprier d'une chose qu'il sait appartenir à autrui. Il importe peu que l'objet eut été appréhende " dans tel ou tel lieu, et que l'agent n'eut pas connu le nom " de son propriétaire, le fait matériel de la soustraction résulte " du seul enlèvement de cet objet. Mais dans la deuxième " hypothèse, lorsque l'objet a été ramassé sans aucune intention d'appropriation, lorsque cette intention n'est née, et ne " s'est manifestée qu'ultérieurement, la solution n'est pas la " même car s'il n'y a pas eu fraude au moment de l'appréhension il n'y a pas eu de soustraction, et si plus tard l'intention frauduleuse est survenue chez l'agent, il ne pouvait " soustraire un objet qui était en sa possession.

" Le deuxième élément du vol est l'intention frauduleuse. " Il n'y a pas de délit lors même qu'il y aurait eu soustraction

thing is theft, as in the case of a man riding off with a horse after getting leave to mount in order to try him.

[1] This is exactly the same as the law of England ; see my *Digest*, Art. 302, p. 14.

"si cette soustraction a porté sur une chose que l'agent Ch. XXVIII.
"croyait lui appartenir, ou en croyant agir avec l'assentiment
"du propriétaire.

"Il faut, en troisième lieu, pour constituer le vol que la
"chose frauduleusement soustraite soit la propriété d'autrui.
[1] "Celui qui soustrait sa propre chose ne commet pas un vol.
"La soustraction même frauduleuse ne constitue point un
"vol, si la chose soustraite n'est pas la propriété d'un tiers.
"On distingue les choses qui n'ont encore appartenu à per-
"sonne, celles qui sont abandonnées, et celles qui ont été
"perdues."

These fundamental principles of the French law of theft correspond with singular exactness to the English common law. Each is founded upon an adaptation of the Roman law, and each rejected the same parts of the Roman law, namely, the *lucri causâ*, and the *usus ejus possessionisve*, though the French law appears to have retained them longer than the English. Each makes theft depend upon a wrongful taking, and not upon a wrongful appropriation of the stolen article. Each draws the same inferences from this principle, the most striking illustration of which is to be found in the identity of their provisions as to the case of appropriating goods accidentally found.

The French have adhered to this principle more closely than the English, and each I think is in error. I see no difference either in the moral guilt or the public danger of the dishonest misappropriation of a thing which the misappropriator becomes possessed of honestly, and the misappropriation of one which he misappropriated by a fraudulent taking. The English law, as I have already shown, has made so many exceptions to the old rule as to show to demonstration, that in this country at least, it has been found to be in the highest degree inconvenient.

Both the French and the English law agree in the doctrine that moveable things only can be stolen, and that rights cannot be stolen. The French lawyers, however, do not appear to have drawn from these doctrines the absurd inference that

[1] This is probably not the law of England.

CH. XXVIII. things severed from the soil, and documents which are valuable only as evidence of rights cannot be stolen.

According to English law, the offence of fraudulent misappropriation of property falls, as I have shown, into three principal divisions, theft, obtaining goods by false pretences, and criminal breach of trust, the last being a common name for many offences made punishable by modern statutes, and not provided for by the common law. This division of the subject is also adopted in the French law. The names of the three crimes being *vol, escroquerie,* and *abus de confiance.* The differences between them are thus described:—

[1] "Elle" (la soustraction) "ne peut être remplacée par aucune "circonstance équivalente. Si l'agent a reçu du détenteur "lui même à quelque titre que ce soit l'objet qu'il a dissipé, il "commet un abus de confiance: s'il a détourné la chose qui "lui avait été, confiée il se rend coupable d'une violation de "dépôt; s'il s'est fait remettre des valeurs quelconques par ses "manœuvres, il exécute une escroquerie; dans ces divers cas "la fraude est la même, le mode d'exécution de la spoliation "diffère seul; c'est donc ce mode qui imprime au délit sa "qualification."

The articles of the code which relate to these subjects are 405 and 408. Article 405 has a considerable degree of resemblance to the English statute which punishes the obtaining of goods by false pretences, and the cases decided upon it, and both the courts and the legislature appear to have experienced difficulties in dealing with the subject similar to those which have been experienced in this country, and which are, indeed, inherent in the nature of the subject. The two forms of the article were as follows:—

1791.	1810.
"Ceux qui par dol, ou à l'aide de "faux noms ou de fausses entreprises, "ou d'un crédit imaginaire, ou d'espérances, ou de crainte chimérique, auraient abusé de la crédulité "de quelques personnes et escroqué	"Quiconque, soit en faisant usage "de faux noms ou de fausses qualités, "soit en employant des manœuvres "frauduleuses pour persuader l'existence de fausses entreprises d'un "pouvoir ou d'un crédit imaginaire,

[1] *Théorie du Code Pénal,* v. p. 47.

1791.	1810.
"la totalité ou partie de leur fortune "seront," &c.	"ou pour faire naître l'espérance ou "la crainte d'un succès d'un accident, "ou de tout autre événement chimér-"ique, se sera fait remettre ou délivrer "des fonds, des meubles, ou des obliga-"tions, dispositions, billets, promesses, "quittances, ou décharges, et aura par "un de ces moyens escroqué ou tenté "d'escroquer la totalité ou partie de la "fortune d'autrui, sera," &c.

The article of 1791, which made the obtaining of property by "dol" an offence, may be compared to that interpretation of the statute of George II. which would have made every fraudulent breach of contract a crime. The more elaborate language of 1810 (still in force as article 405 of the *Code Pénal*), is by no means unlike the interpretation put upon the statute of George II. and the later acts by the numerous cases which have been decided upon them.

The expression, "manœuvres frauduleuses" in article 406, has, as interpreted by French writers, considerable resemblance to the English doctrine, that a false pretence must relate to an existing fact. [1] "Les manœuvres . . . supposent "une certaine combinaison de faits ; une machination préparée "avec plus on moins d'adresse. Les paroles, les allégations "mensongères, les promesses, ne sont point isolées de tout fait "extérieur, des manœuvres ; il faut qu'elle soient accompagnées "d'un acte quelconque destiné à les appuyer et à leur donner "crédit. Cette distinction a été consacrée par de nombreux "arrêts qui ont reconnu que la jactance d'un pouvoir imagi-"naire, les fausses assurances d'une fortune chimérique, et "en général les simples mensonges lorsqu'ils ne portent, ni sur "le nom ni sur la qualité, ne peuvent être considerées comme "des manœuvres. Mais lorsqu'il se joint aux paroles fraudu-"leuses, un fait extérieur quelconque, l'intervention d'un tiers "la production d'une lettre, une démarche ostensible, une "voyage, tout acte matériel propre à les fortifier, les manœuvres "peuvent résulter de cette combinaison."

This might almost stand for a statement of the English law as to the difference between an indictable false pretence and a fraudulent representation or breach of contract.

[1] Hélie, *Pratique Criminelle*, li. 481.

CH. XXVIII. The offence known in French law as *abus de confiance* has many forms, but the one which approaches most nearly to what we should describe as embezzlement or larceny by a bailee is contained in Article 408. "Quiconque aura dé-"tourné ou dissipé, au préjudice des propriétaires, possesseurs, "ou détenteurs, des effets, denrées, marchandises, billets, "quittances, ou tous autres écrits contenant ou opérant obli-"gation ou décharge, qui ne lui auraient été remis qu'à titre "de louage, de dépôt, de mandat, de nantissement, de prêt à "usage, ou pour un travail, salarié ou non salarié, à la charge "de les rendre ou représenter, ou d'en faire un usage ou un "emploi déterminé, sera," &c. It is remarkable that this definition does not contain the word *frauduleusement*, but the courts [1] appear to have introduced it. The article would punish most of the crimes which have been created by our modern legislation as to criminal breaches of trust. I am not sure, however, that the article would cover all the cases to which our acts as to the frauds of agents would apply.

The circumstances recognised by the French law as aggravations of theft, as changing *vols simples* into *vols qualifiés* are shortly summed up in the following [2] passage: "Les vols sont "qualifiés à raison de la qualité de leur auteur, du temps où "ils ont été commis, du lieu de leur perpétration, enfin des "circonstances qui ont accompagné leur exécution.

"Les vols sont qualifiés à raison de la qualité de leur auteur, "quand ils sont commis (1) par les domestiques, hommes "de service à gages, ouvriers, compagnons et apprentis, (2) par "les aubergistes et hôteliers, (3) par les voituriers et bateliers. "Ils sont qualifiés à raison du temps où ils sont commis quand "ils sont exécutés pendant la nuit.

"Ils sont qualifiés à raison du lieu de leur perpétration "quand ils sont commis (1) dans les maisons habitées et leur "dépendances, (2) dans les édifices consacrés aux cultes, (3) dans "les champs, (4) sur les chemins publics.

"Enfin ils sont qualifiés à raison des circonstances qui ont "accompagné leur exécution quand ils ont été commis (1) de "complicité, (2) avec effraction, (3) avec escalade, (4) avec

[1] *Pratique Criminelle*, ii. pp. 495-496.
[2] *Théorie du Code Pénal*, v. p. 123.

"fausses clefs, (5) avec port d'armes, (6) avec menaces ou "violences, (7) avec usurpation de titres, ou de costumes, ou "supposition d'ordre de l'autorité."

What I have already said will enable any one to see how far these aggravating circumstances differ from or correspond to those of our own legislation; but it would be wearisome and of little interest to carry out the comparison in detail.

The German *Strafgesetzbuch* recognises the same general division of the subject as the English law and the French *Code Pénal*. Its leading definitions are extremely brief and comprehensive, and are as follows:—

"242. Whoever takes away from another any moveable "thing which does not belong to the taker with intent to "appropriate it illegally to himself is liable to be imprisoned "for theft."

"246. Whoever illegally appropriates to himself any "moveable thing which does not belong to him but is in "his possession or is intrusted to him is punishable for "embezzlement (*Unterschlagung*) with imprisonment up to "three years, or if the thing was intrusted to him up to "five years."

"263. Whoever with intent to procure for himself or for a "third person an illegal gain of property, injures the property "of another by leading him into or confirming him in error, "by deceiving him by false allegations of fact or by keeping "back or suppressing the truth, is liable to be imprisoned for "fraud (*Betrug*)." [1]

Here again we have the three cases of theft, embezzlement, and false pretences separately provided for, the definition of theft being almost a translation of the definition of *vol* in the

[1] "242. Wer eine fremde bewegliche Sache einem andern in der Absicht "wegnimmt dieselbe sich rechtswidrig zuzueignen, wird wegen Diebstahls mit "Gefängniss bestraft."

"246. Wer eine fremde bewegliche Sache die er in Besitz oder gewahrsam "hat sich rechtswidrig zueignet wird wegen Unterschlagung mit Gefängniss, "bis zu drei Jahren, und wenn die Sache ihm anvertraut ist mit Gefängniss "bis zu fünf Jahren bestraft."

"263. Wer in der Absicht sich oder einem dritten einen rechtswidrigen "Vermögens-Vortheil zu verschaffen das Vermögen eines anderen dadurch "beschädigt das er durch Vorspiegelung falscher oder durch Enstellung oder "Unterdrückung wahrer Thatsachen einen Irrthum erregt oder unterhält, "wird wegen Betruges mit Gefängniss bestraft."

CH. XXVIII. *Code Pénal*, and being, no doubt, derived from the same origin. How far the definition of *Unterschlagung* (embezzlement) and *Betrug* (fraud, false pretences) would extend in practice, I am not aware. How far, for instance, a fraudulent agent, like Walsh, could be said to have in his possession or custody the bank notes which he ought to have invested for Sir Thomas Plumer, and whether a man who sells an unsound horse at a sound price by falsely stating that he is sound can be said to injure the property of another by making him err by the representation of a false fact, with a view to his own unlawful gain, I do not venture to conjecture.

The circumstances of aggravation recognised by the German law in regard to theft are in general similar to those given in the *Code Pénal*, and were probably to some extent suggested by them. They are simpler and less elaborate.

CHAPTER XXIX.

COINAGE OFFENCES—FORGERY—MALICIOUS INJURIES TO PROPERTY.

Two classes of frauds by which property may be fraudulently misappropriated are of so much importance as to have been the subject of elaborate special legislation, the results of which are two of the Consolidation Acts passed in 1861. These are coining and forgery. The history of the law upon these subjects possesses some features of interest, though none attaches to its details. The subject may accordingly be disposed of very shortly. CH. XXIX.

The allusions to these offences in the Anglo-Saxon laws are [1] few, and such as there are, apply apparently to the crime of coining. Glanville gives a full definition of the "crimen falsi," as follows: [2] "Generale crimen falsi plura "sub se continet crimina specialia. Quemadmodum de "falsis cartis, de falsis mensuris, de falsâ monetâ, et alia "similia quæ talem falsitatem continent super quam aliquis "accusari debeat et convictus condemnari . . . . notandum "quod si quis convictus fuerit de cartâ falsâ distinguendum "est utrum carta regia an privata; quia si carta regia tunc "is qui super hoc convincitur condemnandus est tanquam de "crimine lœsæ majestatis. Si vero fuerit carta privata tunc "cum convicto mitius agendum est sicut in cæteris minoribus "criminibus falsi." Glanville thus classes forgery and coining under one head. He is followed in this in substance by

[1] Cnut, Secular Laws, 8 (Thorpe i. p. 381), is the most important law. "Falsarii monetæ suæ" is one of the pleas of the crown specified in Hen. 1, x. p. 1; Thorpe, i. p. 519.

[2] Glanville, lib. xix. c. 7.

CH. XXIX. Bracton, [1] who thus describes the offence: "Continet etiam "sub se crimen læsæ majestatis crimen falsi quod quidem "multiplex est: ut siquis falsaverit sigillum domini regis, vel "monetam reprobam fabricaverit, et hujusmodi." [2] Elsewhere he says: "Est et aliud genus criminis læsæ majestatis, "quod inter graviora numeratur quia ultimum inducit supplicium et mortis occasionem, sc. crimen falsi, in quâdam sui "specie, et quod tangit coronam ipsius domini regis, ut si ali-"quis accusatus fuerit vel convictus quod sigillum domini regis "falsaverit, consignando inde chartas vel brevia, vel si chartas "confecerit et brevia et signa apposuerit adulterina quo casu "si quis inde inveniatur culpabilis vel seysitus si warrantum "non habuerit pro voluntate regis judicium sustinebit" . . . "Est et aliud genus criminis quod sub nomine falsi continetur "et tangit coronam domini regis et ultimum inducit supplicium sicut de ills qui falsam fabricant monetam, et qui "de re non reproba faciunt reprobam sicut sunt retonsores "denariorum."

The law as to treason was declared in the statute of treasons in accordance with these views. In the 25 Edw. 3, st. 5, c. 2, the following provision follows the definition of treason by imagining the king's death and by levying war: "Et si "homme contreface les grant ou prive sealx le Roi ou sa monoie "et si home apport faus monoie en ceste roialme contrefaite "a la monoie d'Engleterre sicome la monaye apelle Lucynburgh, "ou autre semblable a la dite monoie d'Engleterre sachant la "monoie d'être faus pur marchander ou paiement faire en "deceit nostre dit seignur le roi et son poeple." [3] In 1415 this was extended to "ceux qi tondent, lavent, et filent la "moneie de la terre," by 3 Hen. 5, c. 6, and in 1553 (1 Mary, sess. 2, c. 6), to the counterfeiting of coin not the proper coin of the realm, but current in it by the queen's consent. The same statute made it treason to forge or counterfeit the queen's sign manual, privy signet, or privy seal. By 1 Mary, sess. 1, c. 1, the 3 Hen. 5, c. 6, was repealed, but it was re-enacted in 1562 by 5 Eliz. c. 11, and in 1576 a similar enact-

[1] Bracton, ii. 258, fo. 118*b*.
[2] *Ib.* p. 266, fo. 119*b*.
[3] There are similar passages in Fleta, i. chap. 22, and Britton, and see the *Mirror*, p. 23.

ment (18 Eliz. c. 1) was passed, extending the provisions of the act of 1562. CH. XXIX.

Many other statutes were passed at various times punishing some offences connected with the coin as treason and others as felony or misdemeanour. There would be no interest in enumerating them. They were consolidated for the first time in 1832, by 2 Will. 4, s. 34, which repealed the statutes just referred to, together with many others, and thus put an end to that head of the law which used to be described as treasons relating to the coin. This statute continued to be in force till 1861, when it was repealed and re-enacted in substance by 24 & 25 Vic. c. 99, which contains the present law upon the subject. It consists of forty-three sections, of which twenty-five define the various offences which, as experience has shown, may be committed by clippers and coiners. The remainder relate to matters of administration and procedure. The defining actions are to the last degree explicit and minute. They are elaborated to the utmost in order to make it practically impossible to suggest any quibble or evasion by which their operation could be evaded. They comprehend not merely coining and uttering bad money, but making any sort of preparation for that operation, and even being in possession of the materials necessary for carrying it out. I know of no better illustration of one of the most striking points of difference between English criminal legislation on the one hand, and the criminal legislation of France and Germany on the other, than is afforded by a comparison of their provisions on this subject.

The existing French Penal Code punishes the following offences only:—

Art. 132. "Quiconque aura contrefait ou altéré les monnaies "d'or et d'argent ayant cours légal en France, ou participé "à l'émission ou exposition des dites monnaies contrefaites ou "altérées, ou à leur introduction sur le territoire Français, "sera," &c.

The second part of the article substitutes "de billon ou de "cuivre" for "d'or et d'argent."

Art. 133. The same as to all foreign money of whatever material.

CH. XXIX.

Art. 134. "Quiconque aura coloré les monnaies ayant "cours légal en France, ou les monnaies étrangères, dans le "but de tromper sur la nature du métal, ou les aura émises "ou introduites sur le territoire Français, sera," &c.

The English law punishes counterfeiting gold and silver coin; [1] colouring coin or metal; clipping, and other modes of lightening the coin; the unlawful possession of filings and clippings; selling counterfeit coin below its value; importing or [2] exporting counterfeit coin; simple uttering; uttering accompanied by possession of other counterfeit coins; possession of three or more pieces of counterfeit coin with intent to utter, and many other offences.

The German *Strafgesetzbuch* (articles 146-182) is even more concise than the *Code Pénal*.

The law relating to forgery has a somewhat more interesting history than the law relating to offences against the coin.

I have already referred to the statutes by which the forgery of certain seals was high treason. All other forgeries were misdemeanours at common law. In 1413 a statute (1 Hen. 5, c. 3) was passed, which recited that many persons had been deprived of their property by false deeds, wherefore it was enacted, "that the party so grieved shall have his suit in "that case, and recover his damages; and the party convict

[1] Compare the words of s. 3 of 24 & 25 Vic. c. 99, s. 3, with the words of the *Code Pénal*, art. 134, given in the text—"Whosoever shall gild or silver, "or shall, with any wash or materials capable of producing the colour or "appearance of gold or silver, or by any means whatsoever wash, case over, "or colour any coin whatsoever resembling, or apparently intended to re-"semble, or pass for any of the queen's current gold or silver coins; or shall "gild or silver, or shall, with any wash or materials capable of producing "the colour or appearance of gold or of silver, or by any means whatsoever "wash, case over, or colour any piece of silver or copper, or of coarse gold, or "of coarse silver, or of any metal or mixture of metals respectively, being of "a fit size and figure to be coined, and with intent that the same shall be "coined into false and counterfeit coin resembling, or apparently intended to "resemble or pass for any of the queen's current gold or silver coin; or" (the same thing over again, except that it relates to the colouring of genuine coin so as to make it pass for coin of a higher denomination). The French draftsman expects those who administer the law to give to it a scope as wide as would be given say to the language of a common letter by a reader who wished to understand his correspondent. The English draftsman aims at using language which no one, if he takes proper pains to study it, shall be able to pretend to misunderstand, however earnestly desirous to do so.

[2] This does not seem to be provided for by the words of the *Code Pénal*, unless an exporter "participe à émission," which would to an English lawyer appear a somewhat strained construction.

"shall make fine and ransom at the king's pleasure." This method of treating a misdemeanour as a private wrong for which a public penalty was also to be imposed, is very characteristic of our ancient law, and many instances of it might be referred to. The statute can hardly be said to have altered the law, as forgery was always a misdemeanour. The effect of it rather was that when a forgery was brought to light in a civil action the result was a fine to the king as well as damages to the party.

Apart from any statute forgery appears to have been punished from very ancient times by the Court of Star Chamber. [1] "Infinite," says Hudson, "are the examples of "punishments inflicted upon forgeries of all sorts before the "statute of 5 Eliz., and then the falsifying of any deed or "writing which could be given in evidence was here examined "and punished." In 1562 was passed the statute 5 Eliz. c. 14, referred to in the above extract. It is entitled, "An act "against forgeries of false deeds and writings." It recites the evil consequences which had resulted from the "small, mild "and easy" punishments hitherto inflicted for forgery, and enacts that any person who forges "any false deed, charter, or "writing sealed, court roll, or the will of any person in "writing" with intent to defeat, recover, or change the interest of any person in any real property, or who shall give any such deed or writing in evidence knowing it to be forged, shall be liable upon conviction to pay double costs and damages, "and also shall be set upon the pillory in some open "market town, or other open place; and there to have both "his ears cut off, and also his nostrils to be slit and cut, and "seared with a hot iron so as they may remain for a perpetual "note or mark of his falsehood." The offender was also to forfeit to the queen the issues and profits of his land for life, and to "suffer perpetual imprisonment for his life."

If the forged document related to chattels real, or was "any obligation, or bill obligatory, or any acquittance, release, "or other discharge of any debt or action, or other things "personal," the offender was to lose one of his ears and to be imprisoned for a year. Upon a second conviction these offences

[1] *Star Chamber*, p. 65.

CH. XXIX. were felony without benefit of clergy. This act was afterwards superseded by others which made many forgeries capital; but it remained nominally in force till 1830, when it was repealed by 11 Geo. 4, and 1 Will. 4, c. 66, s. 31. The law as to forgery was not, I think, altered by statute in the seventeenth century; but all through the eighteenth century the great increase in trade, which then occurred, was accompanied by a corresponding increase in the severity of the laws relating to forgery. It would be tedious to mention them at any length, but I will notice one or two. In 1729, one Hales, a goldsmith or banker, was tried on several indictments for forging endorsements on promissory notes, an offence to which the statute of Elizabeth did not extend. [1] He was sentenced to be thrice pilloried, to pay a fine of fifty marks, and to be imprisoned for five years. He died "in the Press Yard in "Newgate" three days after standing in the pillory for the second time, probably in consequence of the treatment he received. The forgery of deeds, wills, bonds, bills of exchange and promissory notes, or endorsements on them, was soon after made felony without benefit of clergy, by 2 Geo. 2, c. 25, which was afterwards amended and extended by 7 Geo. 2, c. 22, and 18 Geo. 3, c. 18. Besides these general acts many others were passed, making it felony, without benefit of clergy, to forge a great variety of particular documents. In particular as the paper currency developed itself, provisions of extreme elaboration and minuteness were passed, punishing not only the forgery of bank notes and everything of the nature of a bank note; and the uttering of forged bank notes; but the making or possession of paper suitable for forgery, and of instruments suitable for its manufacture. No part of the criminal law of the latter part of the eighteenth century was more severe in itself, or was executed with greater severity than this. The following were some of the statutes on this subject: 15 Geo. 2, c. 13; 13 Geo. 3, c. 79; 41 Geo. 3, c. 49. This last mentioned act punished with fourteen years' transportation the making of Bank of England paper or the possession of instruments for making it, and many other offences of the same sort.

[1] 17 *State Trials*, 296.

The numerous enactments relating to forgery were first consolidated in 1830 by 11 Geo. 4, and 1 Will. 4, c. 66. This act first provided generally that no forgery should be punished capitally except those for which capital punishment was reserved by the express words of that act. It then enacted (ss. 2-6) that forgery should still be capital in the following cases: forgery of the Great Seal, Privy Seal, Sign Manual, &c. (which was to be high treason), forgery of exchequer bills, and some other public securities; forgery of banknotes, wills, bills of exchange, promissory notes, or warrants, or orders for the payment of money; making false entries in books relating to the public funds, forging transfers of stock, and powers of attorney for the receipt of dividends, &c. Most of the other acts relating to forgery were repealed and re-enacted by the other parts of the act. The repealing clause (s. 30) is itself a compendious history of the law of forgery. It repeals an enactment of Edward III. (the section of the statute of treasons as to forging the great and privy seal), one of Mary, one of Elizabeth (5 Eliz. c. 14, above mentioned), one of James I., one of William and Mary, one of William III., one of Anne, two of George I., four of George II., thirteen of George III., and one of George IV. (4 Geo. 4, c. 76, s. 29, which punished the forgery of entries in marriage registers), in all twenty-six enactments.

The punishment of death was imposed upon the forgery of documents connected with certain life annuities by 2 & 3 Will. 4, c. 59, s. 19; on the forgery of certificates of certain commissioners to administer a fund voted for the relief of Jamaica, Barbadoes, St. Vincent and St. Lucie, by 2 & 3 Will. 4, c. 125, s. 65 (which was extended by 5 & 6 Will. 4, c. 51), and on the forgery of certain receipts connected with the twenty millions raised for compensation to slave-owners by 5 & 6 Will. 4, c. 45, s. 12. These were the last acts by which forgery was punished with death. In 1837 by 7 Will. 4, and 1 Vic. c. 84, the punishment of death for forgery was abolished in all the cases of forgery which had been declared to be capital by the act of 1830 (11 Geo. 4, and 1 Will. 4, c. 66) except only the case of forging the Great Seal and other public seals. This offence continued to

 be high treason punishable with death down to 1861, when it became a felony punishable with penal servitude for life as a maximum. Capital punishment was also abolished in all the cases in which it had been imposed by the other acts passed after 1830.

The Consolidation Act of 1861 (24 & 25 Vic. c. 98) was intended to replace all the then existing legislation on the subject. This act punishes the forgery of public seals, the forgery of documents connected with the public funds, the making of false entries in books connected with them, and the personation of persons entitled to stock or dividends. This is followed by a series of provisions relating to the imitation of paper used for bank notes, whether of the Bank of England or any other bank, and to the construction or possession of instruments suitable for forgery. Next come provisions as to private documents, deeds, wills, bills of exchange, receipts and debentures, and finally provisions as to judicial and administrative papers, books, and registers.

The act, in short, punishes the crime of forgery by an enumeration of the documents which are not to be forged, and in respect of some of the most important kinds of forgeries it punishes preparations for forgery and the very possession of the instruments by which it may be carried out.

The law might in my opinion be greatly improved and simplified by being made much more general and much simpler in its terms. As it stands it is at once long, intricate, hard to understand, and necessarily incomplete. Its faults of style speak for themselves. As to the necessary incompleteness of legislation proceeding on this plan it is shown by a comparison between the act of 1830 and the act of 1861; and more particularly by comparing the repealing act of 1861 (24 & 25 Vic. c. 95) with the repealing clause of the act of 1830 (11 Geo. 4, and 1 Will. 4, c. 66, s. 30). It appears from this comparison that the act of 1830 was incomplete, having omitted some cases of forgery (*e.g.* 2 & 3 Anne, c. 4, 6 Anne, c. 35). On the other hand the repealing act of 1861 was not absolutely correct, for it repeals for a second time some of the acts (*e.g.* 12 Geo. 1, c. 32, s. 9) repealed

by the act of 1830. A remarkable illustration of the inconvenience of proceeding in this manner is supplied by s. 48 of the act. It provides in general terms a punishment for all forgeries which were capital before the act of 1830, and which are not otherwise punishable under the act of 1861. This provision obviously shows a consciousness on the part of the authors of the act that forgeries punishable with death, of which they were not aware, might still lurk in some corner of the statute book. This may well have been the case, for there are a considerable number of forgeries which are not included in either act, having been created by acts of which some passed before and others after the act of 1861. A collection of them is to be seen in the last edition of *Russell on Crimes*, vol. ii., pp. 783-818. The most elaborate provisions on the subject are perhaps those which relate to the forgery of stamps. They are contained in 33 & 34 Vic. c. 98 (the Stamp Duties Management Act, 1870). Of the administrative acts I may mention a few by way of illustration. By 5 & 6 Will. 4, c. 24, s. 3, it is a misdemeanour to forge a certificate of service in the navy. By 2 & 3 Vic. c. 51, s. 9, it is felony to forge minutes relating to pensions for service in the navy, and there are similar provisions in the Merchant Shipping Acts. There are many documents which it is not a statutory offence to forge, and as to which the extreme vagueness of the common law makes it difficult to say whether their forgery is an offence at common law. If, for instance, a man forged letters to prove the existence of a contract the case would not be met by any statute, or if he forged a libel in order that the person libelled might prosecute the supposed libeller. A provision punishing the forgery, with intent to defraud or injure, of any document whatever with a maximum punishment, say, of five years' penal servitude, would supersede an immense number of enactments of this kind, and would involve no real risk of any abuse.

Several of the provisions to which I have referred punish the personation of persons entitled to stocks, dividends, &c., but no general provision against personation as a means of acquiring property was passed, nor was it recognised as an

CH. XXIX. offence at common law till after the trial of the notorious Orton for perjury in asserting that he was Sir Roger Tichborne. The crime, however, was made a felony punishable by penal servitude for life as a maximum by 37 & 38 Vic. c. 36, passed in 1874. [1] There are some special acts as to particular cases of personation.

There are also a few special provisions as to the falsification of particular books of accounts, such as those relating to the public funds, but till very lately there was no general provision on the subject. In 1875, [2] an act (introduced by Sir John Lubbock) was passed which made it a specific offence, punishable with seven years' penal servitude, for any clerk, officer, or servant, wilfully to falsify any account or to omit to make any entry in any account. This enactment was obviously much wanted, as appears from the occasion which led to it. A clerk in charge of a branch of a country bank overpaid his own account to the extent of £1,500. When the inspector came round, the clerk transferred £2,000 from the account of one of the customers to his own, the result being that he appeared to have a credit balance. He was prosecuted, and was held to have committed no legal offence. His overpayment of his own account was only an unauthorised loan to himself. His transfer of the £2,000 was effected without forging the customer's cheque, and by a mere entry in the bank books. The facts that the public got on well enough with no law to punish embezzlement till the end of the eighteenth century, with no law to punish criminal breaches of trust till the beginning of the nineteenth century, with no law to punish fraudulent trustees proper till 1857, and with no law to punish the falsification of accounts, except in a few special cases, till 1875, certainly show that it is possible to exaggerate the importance of the criminal law.

There is no statutory definition of forgery. The accepted common law definition is "making a false document with "intent to defraud." Much discussion has taken place as to the meaning of the expression "making a false document";

[1] See my *Digest*, articles 367, 368; 28 & 29 Vic. c. 124, ss. 6 and 8, ought to be added to the statutes referred to in note 2.

[2] 38 & 39 Vic. c. 24. I owe the information in the text to Sir J. Lubbock.

as to the meaning of "an intent to defraud"; and as to the nature of the evidence by which such an intent must be proved, and as to the cases in which it is to be assumed. I do not think that the history of these discussions has much interest. The result of them and the special forms which they have assumed are given in my [1] *Digest*. I may, however, make one observation on the "intent to defraud."

The meaning of the phrase would be more exactly though less neatly expressed if it was "with intent to deceive in such "a manner as to expose any person to loss or the risk of loss." The object of a forger is nearly always his own advantage, and he thinks that in many cases he will be able to gain his own object without ultimate loss to any person, and it is not at once obvious that such an intention is fraudulent. The Draft Penal Code proposed (p. 316) to define forgery as "the "making of a false document, knowing it to be false, with "the intention that it shall in any way be used or acted upon "as genuine." This would have avoided all questions about intent to defraud, though it would have been hardly possible to forge any document referred to in the Code without an intent to defraud. In my own personal opinion, the provisions of the Draft Code on this subject were too minute, and might advantageously have been replaced by a few provisions of greater generality.

There is the same kind of contrast between the law of England and the provisions of the French and German codes on forgery as there is between their respective laws as to coinage offences. Without going into details as to the various offences which are provided for I may observe that the classes of documents which may be forged mentioned in the *Code Pénal* are not more specially described than by the words "actes," "écriture authentique et publique," "écriture de "commerce ou de banque," "écriture privée" (see articles 145-152). The corresponding expressions in the *Strafgesetzbuch* are "inländische oder ausländische offentliche Urkunde," "eine solche privat Urkunde, welche zum Beweise von rechten "oder rechtsverhältnissen von Erheblichkeit ist" (Art. 267, &c.). This extreme conciseness contrasts strongly with the

[1] Articles 355, 356, 357, pp. 266-273.

CH. XXIX. extraordinary minuteness of the English law. The French "écriture de banque" would no doubt include our "note or "bill of exchange of the governor and company of the Bank "of England, or of the governor and company of the Bank "of Ireland, or of any other body corporate, company, or "person carrying on the business of bankers, commonly called "a bank note, a bank bill of exchange, or a bank post bill, or "any indorsement on or assignment of any bank note, bank "bill of exchange, or bank post bill." It would also, however, include many other things, it is difficult to say precisely what. As to the German "private document important to "the proof of rights or legal relations" it would cover anything from an order to a tradesman for a quire of paper up to the title-deeds of a great estate, and I suppose it would include all bank notes and all commercial paper.

I now come to malicious injuries to property. The law on this subject is contained in 24 & 25 Vic. c. 97, which re-enacts with variations and additions an earlier act on the same subject, 7 & 8 Geo. 4, c. 30, passed in 1827.

The only offence of the kind known to the common law was arson, called in the ancient laws "*bernet*." The common law offence, however, has long since merged in wider statutory enactments. All the law on the subject for centuries past has consisted of a [1] number of statutes passed from time to time for the punishment of particular kinds of mischief which happened to attract attention. The earliest act of the kind was the Statute of Westminster, 13 Edw. 1, st. 1, c. 46, which related to the throwing down of enclosures rightfully made by a person entitled to approve a common. Arson was [2] deprived of benefit of clergy under the Tudors, and one or two statutes were passed for the punishment of injuries to trees in the reigns of Henry VIII. and Charles II., and as to the destruction of ships in the reigns of [3] Charles II. and [4] Anne, but singularly little legislation of this kind took place till before the beginning of the reign of George I. I may, how-

[1] They are stated in detail in East, *Pl. Cr.* pp. 1015-1017.

[2] There was a strange intricate question as to this, owing probably to a slip in the drafting of 1 Edw. 6, c. 12, s. 10, which was considered to have been remedied by a forced construction put upon a statute of Philip and Mary. See East, *Pl. Cr.* pp. 1016-1017.

[3] 22 & 23 Chas. 2, c. 11. s. 12.

[4] 1 Anne, st. 2, c. 9.

ever, notice one of the earlier acts because of its quaintness, and also because it has a family resemblance to a famous act of a much later date and much greater severity. In 1545 was passed an act (37 Hen. 8, c. 6) which began with the following preamble: "Where divers and sundry malicious and "curious persons being men of evil and perverse dispositions, "and seduced by the instigation of the devil, and minding "the hurt, undoing and impoverishment of divers of the "king's true and faithful subjects, as enemies to the common-"wealth of this realm and as no true and obedient subjects "unto the king's majesty, of their malicious and wicked "minds have of late invented and practised a new damnable "kind of vice, displeasure, and damnifying of the king's true "subjects, and the commonwealth of this realm, as in secret "burning of frames of timber prepared and made by the "owners thereof ready to be set up and edified for houses, "cutting out of heads and dams, of pools, motes stews and "several waters; cutting off conduit heads or conduit pipes; "burning of wains and carts loaded with coals or other goods; "burning of heaps of wood cut, felled, and prepared for "making of coals; cutting out of beasts' tongues: cutting "off the ears of the king's subjects: barking of apple-trees, "pear-trees, and other fruit trees, and divers other like kinds "of miserable offences." The burning of frames was made felony, but with benefit of clergy; the other offences named were subjected to a fine of £10, a very inadequate punishment for cutting off a man's ear, or burning his wood, even if we have regard to the change in the value of money.

I have given the substance of this act fully in order to contrast it with the provisions of the Black Act of 1722 which was the next act which dealt with so large a number of cases of malicious mischief. It punished not only offences relating to deer and the offence of maliciously shooting at any person, but it also punished as a felon, without benefit of clergy, every person who should "unlawfully and maliciously "knock down the head or mound of any fishpond whereby "the fish should be lost or destroyed; or shall unlawfully or "maliciously kill, maim, or wound any cattle, or cut down "or otherwise destroy any trees planted in any avenue or

CH. XXIX. "growing in any garden, orchard, or plantation, for ornament, "shelter, or profit; or shall set fire to any hovel, cock, moor, "or stack of corn, straw, hay, or wood." These are almost identical with the offences punished by the statute of Henry VIII. with a fine of £10.

All through the reigns of George II. and George III. acts were passed punishing different instances of the crime of malicious mischief. Provisions to this effect were often introduced apparently by accident or caprice into acts which had totally different objects. For instance, the title of 9 Geo. 3, c. 41 (1769) is as follows: "For regulating the fees of "officers of his majesty's customs in the provinces of Sene-"gambia in Africa, for allowing to the receivers general of "the duties on offices and employments in Scotland a proper "compensation for their troubles and expenses, for the better "preservation of holms, thorns and quicksets in forests, chases, "and private grounds, and of trees and underwoods in forests "and chases; and for authorising the exportation of a limited "quantity of an inferior sort of barley called bigg from the "port of Kirkwall in the islands of Orkney."[1]

In the Repealing Act of 1827 (7 & 8 Geo. 4, c. 27) the number of statutes repealed which relate to acts of malicious mischief to property are as follows: one of Edward I., two of Henry VIII., two of Charles I., one of William and Mary, two of Anne, three of George I., five of George II., eleven of George III., and one of George IV., which had modified the punishments inflicted on frame-breakers by several acts of George II. and George III. The law was consolidated by 7 & 8 Geo. 4, c. 30, which was repealed and re-enacted by 24 & 25 Vic. c. 97, which is now in force.

The provisions of the present statute on the subject embody not only those of the act of George IV. but several later enactments, and like the other acts which I have mentioned show traces, when closely examined, of the effect

[1] One of the oddest instances of this style of legislation which I have met with is the following bit of the Repealing Act (7 & 8 Geo. 4, c. 27): "It "repeals the whole of an act" (19 Geo. 3, c. 74) "intituled 'an act to "'explain and amend the laws relating to the transportation, imprisonment, "'and other punishment of certain offenders, except so much thereof as "'relates to the judges' lodgings.'" This is certainly calculated to imply that the judges' lodgings were places of imprisonment for offenders.

of the gradual abolition of the punishment of death with regard to mischievous arsons.

The following are the classes of subjects to which it relates. Arson and other injuries to property by fire or by explosive substances; injuries to buildings; injuries to different kinds of growing crops and animals; injuries to mines; injuries to river banks and other works connected with water; injuries to railways and telegraphs; offences by which ships are injured or endangered.

There would be no interest in discussing the details of these enactments. I will give one as a specimen. The Waltham Black Act, 9 Geo. 1, c. 22 (1722) was originally to continue in force for three years only; but it was continued by 12 Geo. 1, c. 20, and again by 6 Geo. 2, c. 27, which also enacted that any one who, whilst the Black Act continued in force, should maliciously cut any hopbinds growing on poles in any plantation of hops should suffer death as a felon without benefit of clergy. After other re-enactments and changes which I need not mention, the enactment as to hopbinds found its way into 7 & 8 Geo. 4, c. 30, s. 18, the capital punishment being reduced to a maximum of fourteen years' transportation, and from this act it was taken into 24 & 25 Vic. c. 97, where it forms s. 19.

There is not so marked a contrast between the English law on the one hand and the French and German codes on the other on this subject as I have remarked in reference to the offences of forgery and coining.

The provisions of the *Code Pénal* upon this matter will be found in articles 434-463 under the general title of "destruc-"tion, degradation, dommages." The German law is to be found in articles 303-330 under the heads of "Sachsbeschä-"digung" and "gemeingefährliche Verbrechen und Ver-"gehen."

CHAPTER XXX.

OFFENCES RELATING TO TRADE AND LABOUR.

CH. XXX.

THOUGH the Consolidation Acts of 1861 provide for the punishment of most of the common offences against the person and property of individuals, they do not provide for all of them. Offences relating to trade form a separate group, which I now proceed to examine.

As might have been expected, there is no department of the law in which greater changes have taken place. When England was mainly a pastoral and agricultural country, and when commerce was still in its infancy, the trade offences which in our days are most important were unknown; when there was no such thing as bankruptcy there could be no fraudulent bankrupts. On the other hand, proceedings which we now regard as part of the common course of business were treated as crimes. Usury, forestalling and regrating, continued to be so regarded at all events in theory till very modern times. As time went on, and commerce became more and more important, the old view as to the criminality of usury died away, but the possibility of whole classes of frauds unknown in earlier and simpler times was proved by experience, and punishments were provided for them. Again, in early times it was thought both possible and desirable to provide by law for many matters connected with trade, which we think it wiser to leave unregulated. Laws, for instance, were passed which prescribed the terms as to apprenticeship on which people should be permitted to work at given trades. This legislation came to be regarded

as opposed to the principles of political economy, and it was abolished; but considerations not usually recognized or regarded with favour by political economists have induced the legislature of our own times to pass a large number of acts regulating particular branches of trade and manufacture, and containing a greater or less number of penal clauses. Such in general is the nature of the offences connected with trade. CH. XXX.

More particularly, they may be divided into three classes, which, if we take them according to the antiquity of the roots from which they spring, are as follows:—

1. Offences consisting in a supposed preference of private to public interest. These are usury, forestalling, and regrating, and conspiracies in restraint of trade.
2. Offences against laws regulating particular trades.
3. Commercial frauds, and in particular the offences of fraudulent debtors, and fraudulent officers of companies.

The first class of offences connected with trade and labour are those which were supposed to consist in a preference of private to public interest. Our older legislation laid upon the use of property many restrictions, which have in the course of time been almost entirely removed under the influence of the principle that the State should as a rule protect individuals against nothing but actual force, or the threat of such force, and the grosser kinds of fraud—a principle against which there has for some years past been a reaction of considerable importance. In early times, however, the principle itself was not admitted. On the contrary, it was supposed to be the duty of the king and the parliament to provide directly, and by many kinds of interferences with private affairs, for the general well-being of the whole community, and of all the classes of which it was composed. Whether, as has been usually asserted, these attempts were at all times and at all places mischievous failures is a question which it would be curious to examine if any one with the proper qualifications for such a task were to undertake it. The assertions to the contrary which have been made, or rather suggested, by a few writers of a peculiar temper, who dislike the existing state of things,

CH. XXX. appear to me to express rather the sentiments of their authors than inferences from evidence.

Whatever may have been the policy of the ancient laws about trade, there can be no doubt either of their nature or of the spirit in which they were conceived. They all proceed upon the principle that the interests of individuals may be pursued to an extent which is injurious to the public, and that such an abuse ought to be restrained by law. This sentiment was nowhere so fully expressed as in the laws relating to usury, which was in this and many other countries punished both as a sin and as a crime. Usury was defined and forbidden by the [1] laws of the Twelve Tables, though there is a controversy as to what the meaning of the definition "unciario fœnore amplius" was, some persons understanding it to mean more than 1 per cent. per annum, others more than $8\frac{1}{3}$, others more than 10, and others more than cent. per cent.; but "unciarium fœnus," whatever that may have been, was regarded as legitimate.

[2] A variety of ecclesiastical writers, and the canons of different councils spoke in terms of more or less explicit condemnation of all usury, understanding by that expression every loan made in consideration of receiving back more than was lent, and for a considerable time usury was regarded all over Europe as an infamous pursuit which was abandoned to the Jews. [3] This view was attacked at the Reformation by various authors, and was defended amongst others by Bossuet. His treatise is specially directed against the views of Grotius, who characteristically drew a distinction between interest and usury which Bossuet shows to depend upon no principle at all, but to be a practical evasion of an established principle. Whether it was any the worse for that is a question which different persons will answer in

[1] See Vol. I. p. 10.

[2] The ecclesiastical or theological history of the subject is given in Bossuet's "Traité sur l'Usure," *Works* (Versailles edition of 1817), vol. xxx. pp. 643-698. The sixth proposition (p. 676) is: "La doctrine qui dit que l'usure "selon la notion qui en a été donné" (*i.e.* "tout profit qu'on stipuloit ou "qu'on exigeoit au-delà du prêt," p. 643) "est défendue dans la loi nouvelle "à tous les hommes envers tous les hommes est de foi."

[3] "Bucer est le premier auteur que je sache, qui eut écrit que l'usure n'étoit "pas défendue dans la loi nouvelle. Calvin a suivi, Saumaise après."—Bossuet, *ut sup.* p. 677.

different ways, according to the view which they may take of the nature and limits of such speculations. It is no doubt like the distinction between liberty and license—a distinction which gives two names to one thing because the person who makes use of it does not know how otherwise to distinguish between what is to be praised and what is to be blamed. CH. XXX.

It is easy to trace in Bossuet's argument, and in the authorities which he quotes, the line of thought which led to an absolute condemnation of usury in the only broad and fully intelligible sense of the word. Usury, according to this view, is hard, bad in itself, and essentially unjust. It enables the rich man to make a profit out of the misfortunes of the poor. The lending of money ought to be an act of charity to one's neighbour, not a matter of business. The lender is to look for no other profit than the borrower's gratitude. Apart from this appeal to sentiment an appeal was also made to reason. Usury was regarded as essentially unjust upon various grounds, the best-known and most commonly quoted of which was the opinion of [1] Aristotle that usury is against nature.

The decay of the moral and religious objections to usury I need not trace. Bentham's celebrated tract on the subject (the *Defence of Usury*, written about 1785) may be regarded as marking the point at which the older sentiment theoretically expired, though for some practical purposes it is still as vivacious as ever. At this day, when a professional money-lender comes (as they often have occasion to do) into a court of justice, juries will nearly always find against them if they have any sort of excuse for doing so, and I have known cases where, in defiance of strong evidence, and in spite of adverse

[1] See *Politics*, i. ch. 3 (at the end of the chapter). "ευλογώτατα μισεῖται "ἡ ὀβολοστατικὴ διὰ τὸ ἀπ' αὐτοῦ τοῦ νομίσματος εἶναι τὴν κτῆσιν, καὶ οὐκ ἐφ' "ὅπερ ἐπορίσθη· μεταβολῆς γὰρ ἐγένετο χάριν· ὁ δὲ τόκος αὐτὸ ποιεῖ πλέον· ὅθεν "καὶ τοὔνομα τοῦτ' εἴληφεν· ὅμοια γὰρ τὰ τικτόμενα τοῖς γεννῶσιν αὐτά ἐστιν· "ὁ δὲ τόκος γίνεται νόμισμα νομίσματος· ὥστε καὶ μάλιστα παρὰ φύσιν οὗτος τῶν "χρηματισμῶν ἐστίν." It is strange indeed that so great a man as Aristotle should have used language implying that, if a gold coin is lent by A to B for a year, the interest payable by B to A is produced by the gold coin in any sense remotely resembling that by which a seed produces an ear of wheat. What happens is that at the end of the year B pays A a different gold coin of the same value as the first, and a silver coin bearing a certain proportional value to it. Suppose, however, that it was possible by sowing a sovereign to grow a guinea, why not do so?

CH. XXX. summings-up, persons have been acquitted of perjury, conspiracy, and the obtaining of money on false pretences, because the prosecutor was a money-lender. Indeed, though there can be no doubt that the old theological view of the subject was wrong on every sort of ground, and especially in laying down rules which would make commerce and the investment of capital impossible, the sentiment upon which it was founded had much to recommend it. It is to a certain extent recognized by law, as, for instance, by the Pawnbrokers Acts, and by [1] the very insufficient provisions of the Bill of Sales Acts against what is substantially fraud. It seems to me that the trade of the scoundrels who live by pandering to the folly and vice of the young, and driving with ignorant people in difficulties bargains so hard that no one in their senses would enter into them if they understood their provisions, might be stopped with no great difficulty and without interfering with anything which could by courtesy be called a real commercial operation. The general principle of free trade and free contract is so firmly established, that those who believe in it ought not to be afraid of making such apparent or real exceptions to it as are necessary to prevent either fraud or public inconvenience.

However this may be, the history of the law of usury in England is as follows. The earliest notice of the subject with which I am acquainted occurs in the [2] laws of Edward the Confessor: "Usurarios etiam defendit Edwardus, ne "esset aliquis in regno suo. Et si aliquis inde probatus "esset omnes possessiones suas perderet et pro exlege habere-"tur. Hoc autem dicebat sæpe se audisse in curia regis "Francorum, dum ibi moratus esset nec immerito usura "enim summa radix viciorum interpretatur." According to [3] Glanville usurers forfeited all their property to the king, but subject to this singular rule, "Vivus autem non solet "aliquis de crimine usuræ appellari nec convinci: sed inter "cæteras regias inquisitiones solet inquiri et probari aliquem in "tali crimine decesisse per duodecim legales viros de vicineto

[1] This was written before the act of 1882 (45 & 46 Vic. c. 43) amending the act of 1878 (41 & 42 Vic. c. 31) was passed. It is to be hoped that it will prove more successful than its predecessor.

[2] Law xxxiv. Thorpe, i. 461.

[3] Book vii. c. 16.

"et per eorum sacramentum. Quo probato in curia omnes "res mobiles et omnia catalla, quæ fuerunt ipsius usurarii "mortui ad usus domini regis capientur, penes quemcun-"que inveniantur res illæ." Glanville, however, says that if an usurer repented of and desisted from his usury before death his goods were not forfeited afterwards. CH. XXX.

This singular law must have converted usurers other than Jews into sponges, collecting treasure for the king during life which was forfeited on their death. The provision as to their repentance, however intended, would probably have the effect of preventing them from repenting of or concealing their trade. A man would naturally carry on his business with the hope and intention of repenting in time to save his family from the forfeiture, but would probably seldom carry out his intentions. One of the articles of eyre mentioned in [1] Bracton is in exact accordance with Glanville. The justices were to inquire, "De usurariis Christianis mor-"tuis, qui fuerunt, et quæ catalla habuerunt, et quis ea "habuerit."

Usury was an ecclesiastical offence, and in Hale's *Precedents* [2] several cases of prosecution for it are noticed. This led in 1341 to a kind of compromise between the king and the bishops. By 15 Edw. 3, c. 5, passed in that year, it was enacted "that the king and his heir should have the con-"isance of the usurers dead, and that the ordinances of "Holy Church have the conisance of usurers on life as "to them appertaineth, to make compulsion, by the censures "of Holy Church for the sin, to make restitution of the "usuries taken against the laws of Holy Church."

These laws upon the subject were, as might have been expected, found altogether ineffective, and they appear to have been evaded by fictitious sales and other devices, to which 3 Hen. 7, cc. 5 and 6, and some earlier statutes to which they refer, seem to have applied.

[1] Bracton, ii. p. 244, fo. 116B.

[2] *E.g.* No. div. p. 166, A.D. 1578. "Dominus objecit quod detectum est "offitio, that he is suspected to be a usurer. Dictus Simpson fassus est that "he lent owte a little money, and had 11*s*. of the pound, after the rate of "tenne in the hundred; but he did not urge the same, but only the parties "themselves whom he lent his money to did of their own good will give him "after the same rate; but not by compulcion he did urge the same."

CH. XXX. Upon the Reformation a great change took place in the laws relating to usury.

In 1545, by 37 Hen. 8, c. 9, a bill was passed reciting that usury was "a thing unlawful" and that the [1] law on the subject was exceedingly obscure, and enacting that all usurious contracts should be void, and that all offenders against the act should be liable to various forfeitures, including imprisonment, fine, and ransom at the king's pleasure. Incidentally, usury is defined as taking more than 10 per cent. per annum. The legislature thus adopted the view put forward by Calvin and Bucer as to the lawfulness of interest as distinguished from usury. This act was repealed by Edward VI. (5 & 6 Edw. 6, c. 20) but revived in 1570 by 13 Eliz. c. 8, which added to it, and amongst other things provided (14) that "all brokers, "solicitors, and drivers of bargains for contracts" of an usurious character, "shall be to all intents and purposes judged, "punished, and used, as counsellors, attornies, or advocates, "in any case of præmunire." The act also provided (s. 9) that "inasmuch as all usury being forbidden by the law of "God is sin, and detestable," those who took 10 per cent. usury or less, should forfeit the usury. It provided also in substance (s. 9) that all persons who took more than 10 per cent. should be liable to be punished by the ecclesiastical courts as well as under the statutes, but that those who took 10 per cent. or less should "be only punished by the pains and forfeitures "appointed" (for them) "by this act." The legal effect of these provisions seems to have been to declare all taking of interest for money to be illegal, and a detestable sin, but not punishable otherwise than by a forfeiture of the interest taken unless it exceeded 10 per cent., in which case it was both a temporal and a spiritual offence. The enactment forbidding the taking of all interest must have been a dead letter. It was not repealed till 1854, but it seems never to have been enforced or indeed noticed. In 1623, was passed an act (21 Jas. 1, c. 17) which fixed the rate of interest at 8 per cent. It contained a proviso (s. 5) "that no words

[1] "Which acts, statutes, and laws have been so obscure and dark "in sentences, words, and terms, and upon the same so many doubts, "ambiguities, and questions have arisen and grown, and the same acts, "statutes, and laws been of so little force or effect," &c.

"in this law contained shall be construed or expounded "to allow the practice of usury in point of religion or "conscience,"—which may be regarded as the last vestige of the old views to be found in our law. The 8 per cent. was reduced to 6 under the Commonwealth, and by an act passed in 1660 (12 Chas. 2, c. 13). It was further reduced to 5 per cent. by 12 Anne, c. 16, passed in 1713. Finally, "all existing laws against usury" were repealed by 17 & 18 Vic. c. 90, passed in 1854. This act enumerates the statutes before noticed, and its words extend to usury regarded as an ecclesiastical offence.

Forestalling, ingrossing, and regrating was the offence of buying up large quantities of any article of commerce for the purpose of raising the price. The forestaller intercepted goods on their way to market and bought them up so as to be able to command what price he chose when he got to the market. The ingrosser or regrator—for the two words had much the same meaning—was a person who, having bought goods wholesale, sold them again wholesale. This was regarded as a crime. [1] "It was upon conference and mature deliberation resolved "by all the justices that any merchant, subject, or stranger, "bringing victuals or merchandise into this realm may sell "them in gross, but that vendee cannot sell them again in "gross, for then he is an ingrosser according to the nature of "the word, for that he buy in gross and sell in gross, and may "be indicted thereof at the common law as for an offence that "is *malum in se*. That no merchant or any other may buy "within the realm any victual or other merchandise in gross "and sell the same in gross again, for then he is an ingrosser, "and punishable *ut supra*, for by this means the prices of "victual and other merchandises shall be enhanced to the "grievance of the subject, for the more hands they pass "through the dearer they grow, for every one thirsteth after "gain." This resolution was come to, according to Coke, in the 44 & 45 Elizabeth, or 1602; but the law was far older, though it is rather implied by early statutes than expressly stated anywhere. [2] Coke quotes an ancient statute which is not in the printed statutes, and to which his reference is

[1] Coke, *Third Inst.* p. 195.

[2] *Ib.* p. 194.

CH. XXX. not very clear. It begins, "Nullus forstellarius in villa patiatur morari, qui pauperum sit depressor manifeste, et totius communitatis et patriæ publicus inimicus qui bladum pisces, allec, vel res quascunque venales . . . obviando præ cæteris festinat lucrum sitiens vitiosum," &c. A somewhat similar provision occurs in the "Judicium Pillorie," 51 Hen. 3, st. 6 (A.D. 1266). The jurors are to inquire "de forstallariis, qui ante horam debitam et in villa statutam aliquid emant contra statutum villæ et mercati." In later times a long list of statutes was passed, some of which prohibited forestalling in general terms and under various penalties, while others fixed the prices of particular kinds of merchandise, and prohibited any dealings in them which might enhance their price. Thus in 1350 it was enacted that all forestallers of wines, and all other victuals, wares, and merchandises, should be liable to forfeiture, and in default of payment to two years' imprisonment (25 Edw. 3, st. 4, c. 3); and this was strengthened in 1363 by an act ([1] 37 Edw. 3, st. 1, c. 5) entitled, "Merchants shall not engross merchandises to enhance the prices of them, nor use but one sort of merchandise."

The latest general act against regrators and forestallers was passed in the reign of Edward VI., A.D. 1552 (5 & 6 Edw. 6, c. 14). It contains an elaborate definition of the offence, the principal points of which are buying goods on their way to market, contracting to buy goods before they come to market, "making any motion by word, letter, message, or otherwise, to any person or persons for the enhancing of the price or dearer selling of any" goods, dissuading people from bringing their goods to market, buying up dead victuals of any kind in one market in order to sell them at a higher price in a later market at the same place or at any other market within four miles. The punishment of these offences was, on the first conviction, two months' imprisonment and forfeiture; on the second, half a year's imprisonment and forfeiture of double the value of the goods; and on the third, pillory, forfeiture of all the offender's goods and cattle, and imprisonment at the king's pleasure. As a

[1] See also 38 Geo. 3, st. i. c. 2, which repeals part of it.

single instance of laws relating to particular trades, I may refer to 15 Chas. 2, c. 8 (A.D. 1663), which forbad butchers to sell fat cattle, obviously to prevent butchers from using their trade as a pretext for speculating in cattle. This was founded on an earlier act, 3 & 4 Edw. 6, c. 19. CH. XXX.

These statutes were, as might have been expected, either ineffectual or mischievous; and, as political economy came to be better understood, this was recognised, first by the cessation of such legislation, and afterwards by its repeal. The first considerable step towards the repeal of the old laws was made in 1772, just four years before the publication of the *Wealth of Nations*. This was effected by 12 Geo. 3, c. 71 (passed, according to [1] Lord Kenyon, "in an evil hour"), which recites that it has been found by experience that the restraints "laid by several statutes upon dealing in corn, "meal, flour, cattle, and sundry other sorts of victuals, by "preventing a free trade in the said commodities, have a "tendency to discourage the growth and to enhance the "price of the same; which statutes, if put in execution, "would bring great distress upon the inhabitants of many "parts of this kingdom." It then proceeds to repeal five such acts, the most important of them being the act of Edward VI. above referred to. This act left the common law against forestalling and regrating, and all the statutes upon the subject older than Edward VI., in full force, nor did these laws become by any means a dead letter. Prosecutions for forestalling and regrating lasted into the present century. At last, however, the opinions of the political economists fully prevailed, and were carried completely into effect by 7 & 8 Vic. c. 24 (A.D. 1844), "An Act for abolishing the "offences of forestalling, regrating, and engrossing, and for "repealing certain statutes passed in restraint of trade." This act puts an end to the common law offences of "badger-"ing, engrossing, forestalling, and regrating," which it says, "shall be utterly taken away and abolished." It also repeals specifically all the statutes upon the subject already referred

[1] See his summing-up in R. *v.* Rusby, quoted in Campbell's *Lives of Chief Justices*, iv. 131, from Peake, *N. P. Cas.* 189. There were no such prosecutions after Lord Kenyon's time (*Lives of Chief Justices*, iv. 207).

CH. XXX. to, and many others which I have not noticed, and which were left untouched by the act of 1772.

The last offence of the first of the three classes into which I have divided offences against trade is the offence of a conspiracy in restraint of trade. The law as to this matter has been the subject of vehement controversy in our own days, and has indeed attracted a degree of attention bearing some sort of analogy to the attention attracted in earlier times by the law relating to political libels. The general effect of the legislation and litigation which has taken place may, I think, be described in a word as the ascertainment of the limits within which trade unions are lawful. The history of the law upon the subject is extremely curious, as it is connected with various important periods of our general history, and it cannot be properly understood without reference to many branches of the law, some of which have long since been forgotten.

In our own days, and indeed for nearly sixty years past, the doctrine that the wages of labour should be regulated by competition has been generally accepted and expressed by saying that there should be a free course of trade in labour. As is usual when the word "free" is used it has meant different things to different people. In the mouths of employers, and those who sympathise with them, it has commonly meant "a course of trade free from pressure exerted by trade "unions for the increase of wages." In the mouth of workmen, and those who sympathise with them, it has commonly meant "a course of trade free from all legal restrictions upon "the operations of trade unions." In order to understand the law apart from all questions of sympathy, it is necessary to go back to very remote times, and to follow downwards a course of legislation arising out of views very different from our own.

It has been said by several [1] judges and writers of eminence that "a free course for trade has been carefully maintained "from the earliest times," and there no doubt is a sense

[1] See Sir W. Erle on the law relating to trade unions, p. 11 and following. Lord Bramwell's judgment in R. *v.* Druitt contained similar language.

in which this is true. It was recognised in very early times as a matter of great importance that merchants should carry on their pursuits securely. This is provided for expressly by Magna Charta (ch. xxx.) and at a later date by 9 Edw. 3, ch. 1 (A.D. 1333), which provides that all merchants, "within franchise and without, may freely without "interruption sell them" (many things enumerated) "to "what persons it shall please them, as well to foreigners as to "denizens." This statute was considered so important, and was also probably so much violated, that it was confirmed, reenacted, and somewhat extended in 1350 by 25 Edw. 3, st. 4, c. 2. But, although freedom of trade in the restricted sense of its freedom from downright violence and local jealousies was regarded as highly important, it is no less true that freedom of trade in the wide sense, namely, its freedom from all legislative interference, the doctrine that each individual man and every body of men, however constituted, is the best judge of his or their own interests, and ought to be allowed to pursue those interests by any method short of violence or fraud, is quite a modern doctrine. It was for many centuries opposed to the whole current of English legislation. Till very recent times, the statute-book contained a long series of enactments passed upon a diametrically opposite principle. Till within living memory, it was considered to be the special duty of the legislature to regulate all the most important matters connected with trade and labour.

It is impossible to understand the law relating to conspiracies in restraint of trade without some observations upon the leading features of this mass of legislation.

The first act to which I shall refer is the Statute or the Statutes (for there were two) of Labourers, passed in 1349 and 1350 (23 Edw. 3, and 25 Edw. 3, st. 1). These statutes provide, amongst many other things, "that every man and "woman of what condition he be, free or bond, able in body, "and within the age of threescore years," and not having means of his own, "if he in convenient service (his estate "considered) be required to serve, he shall be bounden to "serve him which so shall him require." They are to serve

CH. XXX. under pain of imprisonment; they are to take the customary rate of wages and no more. By the act of 1350 the wages of the most important classes of mechanics were fixed. A master carpenter was to have 3*d.* and a master free mason 4*d.* a day, from Easter to Michaelmas, "and from that time less, "according to the rate and discretion of the justices." Strict provisions were made for the execution of the act, and amongst other things it is remarkable that the courts of quarter sessions for counties originated in a chapter of this statute (cap. 7) requiring the justices then lately appointed to hold sessions four times a year to put it into execution.

The main object of these statutes was to check the rise in wages consequent upon the great pestilence called the black death. They not only regulated the wages of labourers and mechanics, but [1] confined them to their existing places of residence, and required them to swear to obey the provisions of the statute. It has been [2] suggested with much plausibility that the object of this legislation was to provide a kind of substitute for the system of villainage and serfdom, which was then breaking down, though it still retained vigour enough to be a principal cause of Wat Tyler's insurrection.

However this may have been, the Statute of Labourers was for 200 years on [3] several occasions confirmed, amended, extended, and modified. Special care was taken for its rigorous execution by giving wide authority on all the matters dealt with to the county and borough justices, and in at least one instance attempts to evade or neutralise their provisions were made highly penal. I refer to the statute 3 Hen. 6, c. 1 (A.D. 1424), which enacted that, "whereas by

[1] "If any of the said servants, labourers, or artificers, do flee from one "county to another because of this ordinance, that the sheriffs of the county "where such fugitive persons shall be found shall do them to be taken at the "commandment of the justices of the counties from whence they shall flee, "and bring them to the chief gaol of the same county, there to abide till the "next sessions of the same justices."—25 Edw. 3, st. i. c. 7.

"And that none of them go out of the town where he dwelleth in the "winter to serve the summer, if he may serve in the same town, taking as "before is said."—*Ib.* ch. ii.

[2] Nicholls's *History of the Poor Laws*, i. p. 45.

[3] See 12 Rich. 2, cc. 3, 4, 5, 6, 7, 8, 9, 10 (1388); 7 Hen. 4, c. 17 (1405); 2 Hen. 5, c. 4 (1414); 6 Hen. 6, c. 3 (1427) (this statute authorises the justices in quarter sessions to fix the wages of artificers, and gives similar powers in towns to mayors and bailiffs); 6 Hen. 8, c. 3 (1514).

"the yearly congregations and confederacies made by the "masons in their general chapiters and assemblies the good "course and effect of the statutes of labourers be openly "violated and broken," the chapters should not be holden, those that cause them to be assembled and holden should be "judged for felons," and all masons coming to such congregations should be punished by imprisonment, fine, and ransom.

In 1548 a more general statute was passed, namely, 2 & 3 Edw. 6, c. 15, which forbade all conspiracies and covenants of artificers, workmen, or labourers, "not to make or do their "work but at a certain price or rate," or for other similar purposes, under the penalty, on a third conviction, of the pillory and loss of an ear, and to "be taken as a man "infamous."

The greater part of the earlier legislation on the subject was reviewed, to some extent repealed and amended, and consolidated into a longer act by 5 Eliz. c. 4, passed in 1562. This is entitled, "An Act containing divers orders for artificers, "labourers, servants of husbandry, and apprentices." It is most elaborate. It repeals many of the earlier provisions, and contains a considerable number of enactments in favour of labourers and artificers. Its leading provisions in reference to the particular matter under consideration are as follows:—All persons able to work as labourers or artificers and not possessed of independent means or other employments are bound to work as artificers or labourers upon demand. The hours of work are fixed; power is given to justices in their next sessions after Easter to fix the wages to be paid to all mechanics and labourers; elaborate rules are laid down as to apprenticeship, and it is provided (s. 31) that for the future no one is to "set up, occupy, use, or exercise any craft, "mystery or occupation now used" in England or Wales, unless he is serving or has served an apprenticeship of seven years to it. This statute remained in force practically for a long period of time. It was not formally repealed till the year 1875. To trace the history of its administration, and in particular to give the steps by which it became to a great extent a dead letter, would be in the highest degree curious and interesting; but it is a task which I cannot

Ch. XXX. undertake, and which cannot be treated incidentally in such a work as the present. I may observe, however, that it has a close connection with the history of the Poor Laws, which were consolidated, revised, and improved by the memorable act of 1601, 43 Eliz. c. 2, passed just thirty-nine years after the statute relating to artificers. Throughout the whole of the seventeenth and the greater part of the eighteenth century no act was passed for the general regulation of trade and labour in any degree comparable in importance to the 5 Eliz. c. 4. A considerable number of acts, however, were passed bearing more or less on trade offences. They were, for the most part, acts relating to particular trades, and prohibiting combinations in respect to the wages payable in those trades. Thus for instance in 1720 was passed 7 Geo. 1, st. 1, c. 13, "An Act for regulating the journeymen tailors within the "bills of mortality." This act declared all agreements between journeymen tailors "for advancing their wages, or "for lessening their usual hours of work" to be null and void, and subjected persons entering into any such agreement to be imprisoned with or without hard labour for two months. The hours of work were to be from 6 A.M. to 8 P.M. less an hour for dinner, and "one penny halfpenny a day for break- "fast." The wages were to be any sum not exceeding two shillings a day from March 25th to June 24th, and for the rest of the year not exceeding one and eightpence. The courts of quarter sessions had power to regulate these rates both as to time and as to wages. Similar enactments were passed with respect to the woollen manufactures in 1725 (12 Geo. 1, c. 34), the hat trade in 1749 (22 Geo. 2, c. 27), the silk weavers in 1777 (17 Geo. 3, c. 55), and the paper trade in 1795 (36 Geo. 3, c. 111). This last-mentioned act fixes the hours of work at twelve, with one hour for refreshment. It says nothing as to wages, but enters into much detail as to the suppression of the combinations which it prohibits.

In the year 1799 a general act was passed (39 Geo. 3, c. 81), for the suppression of all combinations by workmen for the purpose of raising wages. It remained in force, however, only for a year, being repealed and replaced in 1800 by 40 Geo. 3, c. 60. There was hardly any substantial differ-

ence between the two acts, except that the latter contained a series of clauses empowering masters and men to refer their disputes to arbitration, and intended to facilitate that operation. The later act made also a few small alterations in the procedure for the recovery of penalties provided by the earlier acts. The later act remained in force till the year 1824. The most important of its provisions were as follows :— CH. XXX.

It declared that all contracts theretofore entered into between journeymen manufacturers or other persons for obtaining an advance of wages for themselves or others, or for shortening hours of work or decreasing the quantity of work, should be void, [1] except only contracts between any master and any journeyman as to the wages, &c., of that journeyman.

[2] The same declaration was made as to all contracts "for "preventing or hindering any person from employing whom-"soever he thinks proper, or for controlling or any way "affecting any person carrying on any manufacture, trade, "or business, in the conduct or management thereof."

[3] Any journeyman who enters into any such contract is to be liable to imprisonment up to three months without hard labour, or two months with hard labour.

[4] The same penalty is appointed for every journeyman workman or other person who "enters into any combination "to obtain an advance of wages, or to lessen or alter the "hours of work, or for any other purpose contrary to the "act, or who, by giving money, or by persuasion, solicitation, "or intimidation, or any other means, wilfully and maliciously "endeavours to prevent any unemployed person from taking "service; or who, for the purpose of obtaining an advance of "wages, or for any other purpose contrary to the provisions of "the act, wilfully and maliciously [5] induces, or tries to induce, "any workman to leave his work; or who hinders any "employer from employing any person as he thinks proper, "or who being hired refuses without any just or reasonable

[1] This exception was not made in the earlier act, probably by a slip in drafting.

[2] S. 1, last part. [3] S. 2. [4] S. 3.

[5] "Decoy, persuade, solicit, intimidate, influence, or prevail, or attempt or "endeavour to prevail on," &c.

CH. XXX. "cause to work with any other journeyman or workman "employed or hired to work."

[1] The same penalty is inflicted upon all persons who attend meetings for any of the purposes declared to be illegal, or persuade people to attend such meetings, or collect money for the purpose of furthering such efforts.

[2] Lastly, it is made an offence (to put it shortly) to assist in maintaining men on strike.

These were the Combination Laws. It is remarkable that in the parliamentary history for 1799 and 1800 there is no account of any debate on these acts, nor are they referred to in the *Annual Register* for those years. It is, however, obvious that whatever may have been the immediate occasion of the laws in question, they carried out and developed to their natural and legitimate conclusion a great mass of earlier legislation, going back to the Statute of Labourers, which again has a relation to the still earlier period when a considerable part of the population were serfs. First, it is enacted that labourers and mechanics are to work at certain wages and to reside at certain places. In process of time this became inconsistent with the altered circumstances of society, and a system is substituted for it under which wages are still to be fixed, and all mechanics are to go through a regular apprenticeship for seven years, all the conditions as to the taking of apprentices being carefully regulated by Act of Parliament. Incidentally, combinations to raise wages are forbidden, but with no detail. This system also breaks down as new trades spring up, and numbers of workmen are collected in manufacturing towns and brought into a proximity to each other which cannot but make them feel their own power, and suggest to them that, as against their employers, they have common interests which may be promoted by combinations. The difficulties which arise from this conflict between the existing law and the new facts are at first provided for by particular statutes relating to particular trades. At last they are made the subject of a general act, which applies in the most detailed, specific, uncompromising way the principle upon which all the earlier legislation had

[1] S. 4. [2] S. 5

depended. Workmen are to be contented with the current rate of wages, and are on no account to do anything which has a tendency to compel their employers to raise it. Practically, they could go where they pleased individually and make the best bargains they could for themselves, but under no circumstances and by no means, direct or indirect, must they bring the pressure of numbers to bear on their employers or on each other.

So far the statute law was clear and consistent. I should not myself describe it as a system specially adapted and designed to protect freedom of trade. The only freedom for which it seems to me to have been specially solicitous is the freedom of the employers from coercion by their men.

Before continuing the history of the statute law it is necessary to say something as to the common law upon the subject of offences against trade by way of conspiracy or combination. Hardly any legal question has in our days been discussed more earnestly or with greater research than this. In particular, one of the greatest judges of our day, the late Sir W. Erle, wrote, when chairman of the Trade Union Commission which reported in 1869, an elaborate [1] memorandum on the law relating to trade unions, and Mr. R. S. Wright, in a [2] work of remarkable learning and ability, collected and commented, with a special view to this particular subject, upon every case ever decided upon the subject of conspiracy. The matter has been also fully discussed in many other works. The result is that the following statement as to the result of the authorities upon the subject may be depended upon:—

1. No case has ever been cited in which any person was, for having combined with others for the raising of wages, convicted of a conspiracy in restraint of trade at common law before the year 1825. There is indeed one case, that of the [3] journeymen tailors of Cambridge, which may perhaps be an authority the other way, but [4] this appears doubtful.

2. There are some dicta to the effect that such combinations would be unlawful. The most important of these is the

[1] Separately published by Messrs. Macmillan in 1869.
[2] *The Law of Criminal Conspiracies and Agreements*, Butterworth, 1873.
[3] 8 *Modern Rep.* p. 10.
[4] See remarks in Wright on *Conspiracies*, p. 53.

CH. XXX. dictum of Grose, J., in [1] R. *v.* Mawbey: "In many cases an "agreement to do a certain thing has been considered as "the subject of an indictment for a conspiracy, though the "same act, if done separately by each individual without "any agreement among themselves, would not have been "illegal. As in the case of journeymen conspiring to raise "their wages; each may insist on raising his wages if he "can, but if several meet for the same purpose it is illegal, "and the parties may be indicted for a conspiracy." This dictum is an illustration not necessary to the decision of R. *v.* Mawbey, and founded as it seems to me upon the case of the Cambridge tailors.

3. [2] "Some traces may be found in the ancient books of a "doctrine that it may be criminal, independently of combina-"tion, for one man to oblige another (by bond or otherwise) "to abstain from the exercise of his proper craft or employ-"ment." These traces, however, are very faint, though it is clear enough that the attempt to create monopolies by royal grants or by bye-laws made by bodies corporate or the like, or to restrain people by contract from exercising their trade, were always held to be illegal (except under certain limitations which do not affect this matter) in such a sense as to be void.

I must add that I am quite unable to understand why, if all combinations to raise wages were at common law indictable conspiracies, it should have been considered necessary to pass the long series of acts already referred to. These acts are not in their form declaratory, nor do they even assume that contracts between workmen for the purpose of raising their wages are illegal in the sense of being void and so incapable of being enforced by law. On the contrary, they enact that they shall be void. Sir W. Erle observes that whilst the ancient statutes [3] "were in force they tended to prevent a "resort to the common law remedy for conspiracy." The inference from the existence of the statutes appears to me to be that until they were passed the conduct which they punish was not criminal.

On the other hand, the cases and dicta to which I have

[1] 6 T.R [2] Wright on *Conspiracies*, p. 43. [3] P. 37.

referred explain the undoubted fact that in the year 1825 an impression prevailed that a combination to raise wages would constitute an indictable conspiracy at common law.

Apart from merely legal considerations, it ought, in approaching the study of the later statutes and cases on the subject, to be borne in mind that trade unions were condemned, at all events by the rich and by employers of labour, on grounds altogether independent of any legal theory whatever. This condemnation proceeded upon two totally distinct grounds. The political economists, in many instances at least, wrote as if an attempt to alter the rate of wages by combinations of workmen was like an attempt to alter the weight of the air by tampering with barometers. It was said that the price of labour depended, like the price of other commodities, solely upon supply and demand, and that it could not be altered artificially.

On the other hand, it was said that, whatever might be the ostensible or even as far as they went the real objects of trade unions, their members habitually obtained those objects by unlawful means,—by intimidating workmen who proposed to work at a lower price than the one sanctioned by them; by acts of annoyance of greater or less atrocity; by personal violence, amounting in some cases to murder; and by the destruction of machinery, buildings, and other property by fire or gunpowder.

Further it was said that many of the proceedings of trade unions were secret and illegal in themselves, that the members often swore obedience to secret committees, and under the compulsion of such oaths committed crimes in order to carry out their purposes. [1] This was no doubt true to a considerable extent—to what extent must always be a question, and it is not surprising that the terror and indignation excited by the means employed should have been transferred to the bodies connected with such proceedings. The undoubted

[1] As instances in which such facts were judicially proved, I may refer to the trial of the Glasgow cotton-spinners at Edinburgh in 1838, and the proceedings before the Commission which sat at Sheffield in June and July, 1867, under 30 Vic. c. 8 (Trades Union Commission Act, 1867). Under the Combination Laws the irritation and violence of the workmen was, I believe, greater than after the acts of 1824 and 1825. See "Resolutions of Select Committee of "the House of Commons," May 21, 1824, Hansard, xi. p. 811.

P 2

CH. XXX. fact that in their capacity of benefit societies, and societies for assisting workmen in obtaining employment, the trade unions had rendered valuable services to artisans was perhaps not as fully present as it ought to have been to many of those who felt strongly on the subject.

However this may have been, two acts were passed in 1824 and 1825 which set the whole of the law on the subject on an entirely new basis. They represented and were based upon the view that labour, like other commodities, was to be bought and sold according to the ordinary rules of trade; every one was to be free, not only to buy and sell as he chose, but to consult with others as to the terms on which he would do so. This was the essence of the act 5 Geo. 4, c. 95, which was introduced into parliament by Mr. Joseph Hume, and [1] passed after singularly little discussion—so far as appears from Hansard's debates. The act begins with a long repealing section which has considerable historical value. This section repeals all the acts noticed above, so far as they relate to combinations of workmen. It then proceeds to enact (s. 2), "That journeymen, workmen, or other persons, who "shall enter into any combination to obtain an advance, or "to fix the rate of wages, or to lessen or alter the hours or "duration of the time of working, or to decrease the quantity "of work, or to induce another to depart from his service "before the end of the time or term for which he is hired, or, "not being hired, to refuse to enter into work or employ-"ment, or to regulate the mode of carrying on any manu-"facture, trade, or business, or the management thereof, shall "not therefore be subject or liable to any indictment or pro-"secution for conspiracy, or to any other criminal information "or punishment whatever, under the common or the statute "law."

The following section (3) gave a similar exemption to

[1] I have traced the progress of the bill through Hansard. It was introduced by Mr. Hume, February 12, 1824. It was referred to a Select Committee, which reported on the subject, May 21, and it seems to have become law without any further debate of much importance in either house of parliament. The attempt to ascertain from Hansard the true grounds and history of acts of Parliament is often disappointing. Moreover, the earlier volumes are often imperfect. In the *Annual Register* for 1825 there is a far better report of Mr. Huskisson's speech about the Trade Union Bill of that year than is to be found in Hansard.

masters entering into any combination for the purpose of lowering or fixing the rate of wages, or increasing hours of work, or regulating the mode of carrying on business. Ch. XXX.

On the other hand, s. 5 made it an offence punishable by two months' hard labour,

"(*a*) By violence to person or property, by threats, or "by intimidation, wilfully [1] or maliciously to force another "to depart from his hiring or work before the time for "which he is hired, or to return his work before it is finished;

"(*b*) Wilfully or maliciously to use or employ violence to "the person or property, threats or intimidation towards "another on account of his not complying" with trade union rules;

"(*c*) By violence to the person or property, by threats, or "by intimidation, wilfully and maliciously to force any master "or mistress manufacturer, his or their foreman or agent, to "make any alteration in their mode of carrying on their "business;

"(*d*) Combining for any of the purposes before mentioned."

This act continued in force for one year only. It appears from the debates on the 6 Geo. 4, c. 129, by which it was repealed and replaced, that it was considered to have encouraged every sort of combination of workmen. Mr. Huskisson said that the second section read like an invitation to workmen to combine for all trade purposes which were not expressly punishable by the act; and he said that they had accordingly combined for many purposes which he regarded as unjustifiable, *e.g.* to dictate to masters as to how they should conduct their business, to determine whether or not they should take apprentices, to prevent workmen from working, to secure an equal rate of pay for all workmen whether good or bad. Instances were also referred to, in the course of the debate, of violence exercised by trade unions against persons working independently of their rules. The different speakers appear to have thought that the act of 1824 repealed the common law as well as the statutes

[1] It is difficult to see how any of these acts could be done involuntarily or unintentionally, or how, if intentional, they could be otherwise than malicious, according to the meaning of the act. The words are omitted in the act of 1825.

CH. XXX. expressly mentioned, in support of which it might have been argued that it repealed so much of 33 Edw. 1, st. 1 (the Statute of Conspirators), "as relates to combinations or con-"spiracies of workmen or other persons" for trade purposes, which are enumerated at great length. As the statute of Edward I. does not in any way refer to trade, this is intelligible only on the supposition that 5 Geo. 4, c. 95, intended to repeal the common law rule supposed to have applied that statute to such combinations. At the time when the statute of 1824 was passed great uncertainty prevailed as to the extent of the common law upon this subject. Mr. Hume [1] said that Mr. Scarlett thought "that if all the penal laws against com-"binations by workmen were struck out of the statute book "the common law of the land would still be amply sufficient "to prevent the mischievous effects of such combinations."

The act of 1825 (6 Geo. 4, c. 129) differed considerably from the act of 1824. It repealed the act of 1824, with a proviso that all the statutes repealed by it should be repealed, for which purpose it re-enacts verbatim, or almost verbatim, the repealing section of the act of 1824.

Instead of beginning with general sections authorising combinations of workmen and masters, it begins with a penal section forbidding a variety of offences, which is qualified by two narrowly-guarded provisoes answering in some measure to the second and third sections of the act of 1824. The penal section (s. 3) is worded far more elaborately than the penal section of the act of 1824. The offences are punishable with two months' imprisonment and hard labour, and are as follows:—

[2] If any person shall—

(*a*) By violence to the person or property, or

By threats or intimidation, *or*

By molesting or in any way obstructing another,

Force, *or endeavour to force,* any journeyman, manufacturer, workman, or other person hired or employed in any manufacture, trade, or business,

[1] Hansard, x. p. 146.

[2] I have italicised the additions made in 1825 to the corresponding section in the act of 1824.

To depart from his hiring, employment, or work, or Ch. XXX.

To return his work before the same shall be finished;

(*b*) [[1] By any of the means aforesaid]

Prevent, or endeavour to prevent, any journeyman, manufacturer, or other person, not being hired or employed, from hiring himself to or from accepting work or employment from any person or persons;

(*c*) Use or employ violence to the person or property of another, or

Threats or intimidation, *or*

Shall molest or in any way obstruct another,

For the purpose of forcing or inducing such person (shortly) to belong to any trade union or to observe any trade union rule;

(*d*) By violence to the person or property of another, or

By any threats or intimidation, or

By molesting or in any way obstructing another,

Force or endeavour to force any manufacturer or person carrying on any trade or business,

To make any alteration in his mode of *regulating, managing, conducting, or* carrying on his business, *or to limit the number of his apprentices, or the number or description of his journeymen, workmen, or servants.*

The act contains no section corresponding to the provision in s. 6 of the act of 1824, which punishes separately combinations to commit the offences created by sections 4 and 5 of that act. No doubt it was considered that any such conspiracy would be indictable at common law under the general rule that a conspiracy to commit an offence is an indictable misdemeanour.

In the place of the general permission to combine contained in ss. 2 and 3 of the act of 1824, the act of 1825 contains two sections (4 and 5) which come in by way of carefully guarded provisoes upon the offences created by s. 3.

Section 4 provides that the act shall not extend to subject any persons to punishment who meet together for the sole purpose of consulting upon and determining the rate of wages or prices which the persons present at such meetings

[1] This, I think, is the true construction of the sentence.

CH. XXX. shall demand for their work, or the hours for which they shall work; or who enter into any agreement among themselves for the purpose of fixing the wages or prices which the parties entering into such agreement shall demand for their work, or the hours during which they will work.

A corresponding section (5) applies to similar meetings amongst masters for the converse objects.

Such was the legislation of 1824 and 1825 on trade offences. Several observations occur upon it which are necessary in order to understand the later history of the subject. In the first place it is natural to ask why an act of parliament was necessary to punish "violence to the person" for the purposes specified by the two acts? All violence to the person is and always was a battery, and all attempts to offer such violence an assault. Hence it may be asked why special punishments should be required for assaults committed for a particular purpose? The answer is, that in 1825 magistrates had no summary jurisdiction over assaults in general (as they have now). There were a few statutes which gave summary jurisdiction over particular kinds of assaults; as, for instance, assaults on persons carrying certain goods to market, or assaults with intent to hinder or prevent seamen from working at their business. Other assaults were punishable only on indictment, and then not with hard labour. The acts of 1824 and 1825 thus gave a summary remedy for what was at common law an indictable offence.

The really important additions to the common law made by the act of 1825 were those which made men liable to summary punishment for the employment of threats, intimidation, molestation, and obstruction directed to the attainment of the objects of trade unions.

It is remarkable that the act of 1825 contains no such section as occurs in the act of 1824 subjecting to summary punishment persons conspiring to commit the summary offences created by other parts of the act. Probably it was considered that as such conspiracies would by common law be punishable, and as they would be more serious offences than isolated acts of intimidation or obstruction, it would be the best course to leave them to be punished by indictment.

Moreover, at the time when the act was under discussion, an opinion certainly prevailed that conspiracies in restraint of trade were offences at common law apart from the old combination laws and the new statutory provisions. CH. XXX.

However this may have been, many cases came in course of time to be decided upon the common law as to conspiracies in restraint of trade, and as to the effect of the statute of 1825.

Mr. Wright has laboriously collected every case bearing upon the subject, and mentions [1] fourteen, to which reference is made in the note, as having been decided since the act of 1825. I will refer to the most important of those in which the doctrines of the common law upon the subject are fully discussed. The earliest is the case of [2] R. *v.* Rowlands, which was tried before Sir W. Erle at Stafford in 1851. He gives an account of it and of the trial of one Duffield (which took place on the same occasion) in the Appendix to his work upon trade unions.

No complete statement of the facts is given in the various authorities to which I have referred, though the indictment and the material parts of the summing-up of Sir W. Erle are there set forth. The sufficiency of the indictment was contested on highly technical grounds, and the summing-up was also called in question but was upheld. The general nature of the case seems to have been as follows: The leaders of a trade union in London, who had no immediate personal interest in the matter, insisted that an employer at Wolverhampton should pay his men a certain rate of wages, and, in order to compel him to do so, prevailed on his men to leave his employ until he did so and prevailed on others not to enter his employment. This, said Erle, J., was an indictable conspiracy. Workmen may, if they think proper, combine

[1] R. *v.* Dixon, 6 C. & P. 601 (1834); R. *v.* Harris, C. & M. 661, *n.* (1842); R. v. Selsby, 5 Cox, 495, *n.* (1847); R. *v.* Rowlands, 2 Den. 364 (1851); Hilton *v.* Eckersley, 8 E. & B. 47 (1856); R. *v.* Perham, 5 H. & N. 30 (1859); Walsby *v.* Anley, 3 G. & E. 516 (1861); O'Neill *v.* Longman, 4 B. & S. 376 (1863); O'Neill *v.* Kruger, 4 B. & S. 389 (1863); Wood *v.* Bowron, L.R. 2 Q.B. 21 (1866); R. *v.* Skinner, 10 Cox, 493 (1867); R. *v.* Druitt, 10 Cox, 592 (1867); Farrer *v.* Close, L.R. 4 Q.B. 602 (1869); R. *v.* Bunn, 12 Cox, 316 (1872).

[2] 2 Den. *Cr. Ca.* 364; and see the summing-up of Erle, J., in 5 Cox, *C.C.* 460, and also in 3 *Russ. Cr.* 172-173; see also Erle on Trade Unions, p. 13, and Appendix A.

CH. XXX. together "for their own protection, and to obtain such wages "as they choose to agree to demand, but" a combination for the "purpose of injuring another is a combination of a "different nature directed personally against the party to be "injured; and the law allowing them to combine for the "purpose of obtaining a lawful benefit to themselves gives "no sanction to combinations which have for their immediate purpose the hurt of another." He went on to say, "If you should be of opinion that a combination existed for "the purpose of obstructing the prosecutors in carrying on "their business, and forcing them to consent to the book of "prices, and in pursuance of that concert they persuaded the "free men and gave money to the free men to leave the "employ of the prosecutors, the purpose being to obstruct "them in their manufacture and to injure them in their "business, and so to force their consent, with no other result "to the parties combining than gratifying ill-will, that would "be a violation of the law." The summing-up contains more to the same effect.

Reading Sir W. Erle's summing-up in this case and his memorandum on trade unions together, it seems that his view of the subject of conspiracies in restraint of trade was this: At common law all combinations of workmen to affect the rate of wages were illegal. A limited exception was introduced by the statute 6 Geo. 4, c. 129. But the ordinary operations of a strike which do not fall definitely within those narrow exceptions are still illegal conspiracies. It is hardly too much to say that the result of this view of the law was to render illegal all the steps usually taken by workmen to make a strike effective. A bare agreement not to work except upon certain specified terms was, so long as this view of the law prevailed, all that the law permitted to workmen. If a single step was taken to dissuade systematically other persons from working, those who took it incurred the risk of being held to conspire to injure the employer or to conspire to obstruct him in the conduct of his business. It is difficult to see how, in the case of a conflict of interests, it is possible to separate the two objects of benefiting yourself and injuring your antagonist. Every strike is in the nature of an act

of war. Gain on one side implies loss on the other; and to say that it is lawful to combine to protect your own interests, but unlawful to combine to injure your antagonist, is taking away with one hand a right given with the other. CH. XXX.

The case of [1] Hilton *v.* Eckersley, decided in 1856, five years after R. *v.* Rowland, sets in a strong light the extreme difficulty of giving a consistent rational account of the law as it then stood. The case was as follows: Eighteen Lancashire cotton-spinners signed a bond binding themselves severally to carry on their business according to the resolutions of the majority, the bond reciting that the object of the obligors was by means of this combination to counteract certain combinations of workmen whereby "persons otherwise willing to be "employed are deterred, by a reasonable fear of social persecution and other injuries, from hiring themselves," &c. The question was whether this bond could be enforced. Of three judges of the Queen's Bench before whom the case was argued, Crompton, J., thought that the bond was void because the act of entering into it was an indictable misdemeanour, as being a conspiracy in restraint of trade. Erle, J., thought that the bond was good, being rendered lawful by the exception contained in 6 Geo. 4, c. 129, s. 5. Lord Campbell, C.-J., thought that the deed did not constitute an indictable conspiracy, but that it was void because it was opposed to public policy. The Court of Exchequer Chamber (consisting of [2] six judges) thought that the deed was void because it was in restraint of trade, but expressed no opinion as to the question whether or not it was an indictable conspiracy.

The views of Crompton, J., and Lord Campbell, C.-J., on the subject of conspiracy in restraint of trade, are thus expressed. Crompton, J., [3] said, "I think that combinations like those "disclosed in the pleadings in this case were illegal and in-"dictable at common law, as tending directly to impede and "interfere with the free course of trade and manufacture." His chief authority for this proposition was the dictum of

[1] 6 E. & B. 47.
[2] Williams, Crowder, Willes, J.J., and Parke, Alderson, and Platt, B. B.
[3] 6 E. & B. 53.

CH. XXX. Grose, J., in R. *v.* Mawbey, referred to above. Lord Campbell, on the other hand, after referring to this dictum, and stating that "other loose expressions may be found in the books to "the same effect,"[1] says, "I cannot bring myself to believe, "without authority much more cogent, that if two workmen "who sincerely believe their wages to be inadequate should "meet and agree that they would not work unless their wages "were raised, without designing or contemplating violence or "any illegal means for gaining their object, they[2] would be "guilty of a misdemeanour, and liable to be punished by fine "and imprisonment." The result is that the three judges of the Court of Queen's Bench each took a different view of the law on this subject, and that the six judges of the Court of Exchequer Chamber took a fourth view, which excused them from pronouncing an opinion on the question whether such conduct as Lord Campbell described was at common law an indictable conspiracy or not.

[3] Several cases subsequent to Hilton *v.* Eckersley throw a further but a somewhat partial light on the subject. They turn upon the meaning of the word "threat" in the statute 6 Geo. 4, c. 129, s. 3, and arose upon appeals from the decisions of magistrates by which different workmen were convicted of threats. Without going minutely through the cases, the general result is, I think, somewhat as follows: A "threat" means the expression of an intention to do something illegal in order to force an employer, by fear of its execution, to do or not to do something which he has a right to do. But an agreement between workmen to do any act in restraint of trade is an illegal conspiracy. Therefore, an intimation of such an agreement made in order to force the master, *e.g.* to dismiss a particular man or not to take more than so many apprentices, is a threat within the meaning of

[1] 6 E. & B. p. 62. The phrase "loose expressions" seems to me to undervalue the authorities already referred to, especially the case of the Cambridge tailors.

[2] He means would have been at common law, before the statute 6 Geo. 4, c. 129, s. 4, excused them from punishment.

[3] R. *v.* Perham, 5 H. & N. 30 (1859); Walsby *v.* Anley, 30 L.J.M. c. 120 (1861); O'Neill *v.* Longman, 4 B. & S. 376; O'Neill *v.* Kruger, 4 B. & S. 388 (1863); Wood *v.* Bowron, L.R. 2 Q.B. 21 (1866). The three cases last mentioned show what difficulties might arise in the application of the rule laid down.

the act. This sometimes raised delicate questions of fact. As for instance, A. B. C. and D. tell Z. that they will not work for him unless he dismisses E. If from whim, or because E. has an unpleasant temper, or for any other such reason, they have made up their minds that they prefer leaving Z.'s service to working with E., there is nothing illegal in this. They have a right to take such a course either jointly or severally, and it is an act rather of kindness than otherwise to give Z. the opportunity of choosing between them and E. If, on the other hand, their object is to coerce Z. in carrying on his business, their agreement is an indictable conspiracy, and the intimation of it to Z. a threat within the statute.

The effect of these cases was to some extent mitigated by an act (22 Vic. c. 34) passed in 1859, which provided that workmen were not to be considered to be guilty of "molesta-"tion" or "obstruction" under the act of 1825, by reason only of entering into agreements for the purpose of fixing the rate of wages, or hours of labour, or of endeavouring peaceably to persuade others to cease or abstain from work in order to produce the same effect.

Before referring to the alteration of the law to which these cases led, I may mention the case of [1] R. *v.* Druitt, which certainly stated the law in a far stronger and broader form than it had ever been stated in before, so far as I am aware. Persons having been indicted before Lord (then Baron) Bramwell at the Old Bailey for what was known as [2] "picket-"ing," he said, in charging the jury, "The liberty of a "man's mind and will to say how he should bestow himself "and his means, his talents and his industry, is [3] as much a "subject of the law's protection as that of his body. Generally "speaking, the way in which people have endeavoured to "control the operation of the minds of men is by putting "restraints on their bodies, and therefore we have not so

[1] 10 Cox, 600 (1867).

[2] "Picketing consists in posting members of the union at all the approaches "to the works struck against, for the purpose of observing and reporting the "workmen going to or coming from the works, and of using such influence as "may be in their power to prevent the workmen from accepting work there." —*Report*, p. xxi.

[3] The report is in the historical or newspaper reporter's imperfect tense, "was," &c. I have altered this.

CH. XXX. "many instances in which the liberty of the mind is vindicated as that of the body. Still, if any set of men agreed amongst themselves to coerce that liberty of mind and thought by compulsion and restraint, they would be guilty of a criminal offence, namely, that of conspiring against the liberty of mind and freedom of will of those towards whom they so conducted themselves. I am referring to coercion and compulsion—something that is unpleasant and annoying to the mind operated upon; and I lay it down as clear and undoubted law that, if two or more persons agree that they will by such means co-operate together against that liberty, they are guilty of an indictable offence."

If this is correctly reported and is good law, it would follow that if two brothers, having a sister who was about to contract a marriage which they disliked, agreed together to exclude her from their society if she did so, in order by the threat of so doing to prevent the marriage, they would be guilty of an indictable conspiracy. This seems to me to show that the law was laid down far too widely on the occasion in question.

However this may have been, the decisions already referred to were felt by a large number of working men to have the practical effect of reducing to a nullity the degree of liberty to combine for the raising of wages which they thought had been, or ought to have been, conferred upon them by the repeal of the Combination Laws. This feeling was strengthened by [1] decisions that the objects of a trade union were illegal in such a sense that the embezzlement of their funds was not an offence against one of the provisions of the Friendly Societies Act (18 & 19 Vic. c. 63, s. 24), and this created great dissatisfaction with the law. On the other hand, the murders and other crimes committed by the Sheffield trade unions, produced a strong feeling against trade unions.

The result was that a commission was issued in 1867 to inquire into the whole subject. They reported in 1869, the report being based to a great extent upon the memorandum

[1] Hornby v. Close, L.R. 2 Q.B. 153; Farrer v. Close, L.R. 4 Q.B. 602; but see also R. v. Stainer, L.R. C.C.R. 230, which, however, is subsequent to 32 & 33 Vic. c. 61.

as to the state of the law upon the subject drawn up for the guidance of the commission by Sir W. Erle, to which I have already made many references.

It is written with consummate skill and knowledge of the subject, and will be found on examination to resolve itself shortly into the following result: The author conceives of the common law as including, though not entirely consisting of, a set of principles intuitively perceived to be good and just by jurists who flourished at almost any time, and who managed to get other jurists to accept their statements. From these principles flow rules which it is the duty of courts of justice to put into force, when and so far as facts brought under their notice require them so to do. That there should be a free course of trade is one of these principles. That combined efforts to defeat it in particular instances should be indictable conspiracies is one of the rules. The principle and the rule alike were thrown into the shade by the statutes collectively described as the Combination Laws; but upon the repeal of those laws they came forth in full force, and were rather declared than re-enacted by 6 Geo. 4, c. 129, which was founded upon and in its main provisions declaratory of the common law, though it provided summary modes of procedure unknown to that law. The act was to be interpreted in the light of these principles, as in fact it had been by the cases to which I have referred. In one sense this no doubt is perfectly true. It is a correct description of the way in which, as a fact, the courts did construe the act of 1825, and it puts forward, in justification of the course which they took in so construing it, a view of the common law which is attractive to many people, but which seems to me almost entirely imaginary. I think that the law was, in fact, vague and uncertain to the last degree before 1825, except so far as it was embodied in statutes which were repealed by that act; and I agree with Lord Campbell that such authorities as still remain are too weak to support the conclusion that an agreement to combine to raise or depress the rate of wages was an indictable offence apart from the statutes which were so long in force. No doubt, however, the opposite opinion was common enough in 1825, to explain the insertion into the act

CH. XXX. of that year of the clauses which permit such combinations in some cases.

The objections to the law as it stood in 1867 were considered and reported upon. The report of the majority of the commission recommended some degree of relaxation of the law, but proposed to qualify it by a variety of elaborate provisoes, which if adopted would have made the law intricate to an extreme degree, whatever might have been their value. [1] The minority proposed a much wider measure, resembling in its main features what was finally adopted.

The recommendations of the commission of 1867 led to the enactment in the year 1871 of two acts, namely, 38 & 39 Vic. c. 31, "An Act to amend the law relating to trade "unions," and 38 & 39 Vic. c. 32, "An Act to amend the "criminal law relating to violence, threats, and molestation." The Trade Union Act enacted (s. 2) that the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise.

The act amending the criminal law (38 & 39 Vic. c. 32) repealed the act of George IV. and the act of 1859 which amended it, and substituted for them an enactment inflicting imprisonment with hard labour up to three months on every one who, with a view to coerce another for trade purposes (carefully defined in s. 1), should do any of the following things:—

(1) Use personal violence.

(2) Threaten so as to justify a magistrate in binding the threatener over to keep the peace.

(3) Molest or obstruct in any of the following ways—

(*a*) By persistently following any person about from place to place.

(*b*) By hiding his tools, clothes, or other property.

(*c*) By watching or besetting his housé, or following him along any street or road with two or more other persons in a disorderly manner.

[1] Mr. Frederick Harrison and Mr. Thomas Hughes. Lord Lichfield, to a certain extent, agreed with their proposals, but not with their reasons.

It was further provided that no one should be liable to any punishment for doing or conspiring to do any act, on the ground that such act restrains or tends to restrain the free course of trade, unless it was one of the acts above mentioned.

Under this state of the law it was commonly supposed that the ordinary procedure in a strike was legalised, but this was held not to be the case.

In 1872 certain gas-stokers struck, the result of which was that a great part of London was for a time involved at night in complete darkness. They were indicted for a conspiracy to coerce or molest their employers in carrying on their business, and it was held that this was on two grounds an indictable conspiracy, though no offence was committed under the act last mentioned. The first ground was that it was an indictable conspiracy to force the company to carry on their business contrary to their own will by an improper threat or molestation. It seems to have been considered that the great public inconvenience which such a strike would cause, and the nature of the employers' known engagements, might cause a threat to strike suddenly to be an improper molestation. Also a threat of a simultaneous breach of contract was regarded or was pointed out to the jury as conduct which they had a right to regard as a conspiracy to prevent the employer from carrying on his business. Upon this second charge the defendants were convicted and sentenced to eight months' imprisonment.

This case substantially decided, as far as its authority went, that, although a strike could no longer be punished as a conspiracy in restraint of trade, it might, under circumstances, be of such a nature as to amount to a conspiracy at common law to molest, injure, or impoverish an individual, or to prevent him from carrying on his business.

This decision caused great dissatisfaction amongst those who were principally affected by it, and was perhaps the principal occasion of the repeal of the act of 1871, and the enactment in its place of "the Conspiracy and Protec-"tion of Property Act, 1875," 38 & 39 Vic. c. 86. This act provides first that "An agreement or combination by two "or more persons to do or procure to be done any act in

CH. XXX.

"contemplation or furtherance of a trade dispute between "employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be "punishable as a crime," *i.e.* as an offence for which a man may be imprisoned. It was also enacted in general terms (s. 7) that every person who, with a view to compel any other person to abstain from doing or to do any act which such person has a legal right to do or abstain from doing, wrongfully and without legal authority [1] uses violence to or intimidates such person, follows him about, hides his tools, watches or besets his house, or follows him through the streets in a disorderly way, shall be liable to three months' hard labour.

The same punishment is provided by ss. 3 and 4 for every one who wilfully and maliciously breaks a contract to work under a person who is to supply gas or water, or any contract of hiring or service, when he knows or ought to know that such breach of contract is likely to endanger life, cause serious bodily injury, or expose valuable property to destruction or serious injury.

Such for the present is the final result of the long history which I have been relating. It is one of the most characteristic and interesting passages in the whole history of the criminal law.

First there is no law at all, either written or unwritten. Then a long series of statutes aim at regulating the wages of labour, and end in general provisions preventing and punishing, as far as possible, all combinations to raise wages. During the latter part of this period an opinion grows up that to combine for the purpose of raising wages is an indictable conspiracy at common law. In 1825 the statute law is put upon an entirely new basis, and all the old statutes are repealed, but in such a way as to countenance the doctrine about conspiracies in restraint of trade at common law. From 1825 to 1871 a series of cases are decided which give form to the doctrine of conspiracy in restraint of trade at common law, and carry it so far as to say that any agreement

[1] The language of the act is a good deal abridged here. These provisions closely resemble certain sections in the Indian Penal Code hereinafter referred to; namely, s. 490, as to criminal breach of contract, and s. 503, as to criminal intimidation.

between two people to compel any one to do anything he does not like is an indictable conspiracy independently of statute. In 1871 the old doctrine as to agreements in restraint of trades being criminal conspiracies is repealed by statute. But the common law expands as the statute law is narrowed, and the doctrine of a conspiracy to coerce or injure is so interpreted as to diminish greatly the protection supposed to be afforded by the act of 1871. Thereupon the act of 1875 specifically protects all combinations in contemplation or furtherance of trade disputes, and, with respect to such questions at least, provides positively that no agreement shall be treated as an indictable conspiracy unless the act agreed upon would be criminal if done by a single person. CH. XXX.

This remarkable history sets in a clear light all the most characteristic features of English criminal law,—its continuity; the way in which the existing law connects itself with the past history of the country, and in particular with the history of its opinions and theories; the character of the common law, and the nature of what is described as its elasticity; and, finally, the extremely detailed gradual nature of the changes in the law which are effected by acts of parliament eagerly advocated and eagerly opposed. In a legal point of view, no part of the whole story is so remarkable as the part played by the judges in defining, and, indeed, in a sense creating, the offence of conspiracy. They defined it, I think, too widely; but that their definition was substantially right is proved by the fact that the act of 1875 has made provision for punishing practically all the acts which they declared to be offences at common law.

OFFENCES AGAINST ACTS REGULATING TRADE.—The second class of offences relating to trade are offences against laws for the regulation of particular branches of trade and labour.

I have incidentally referred to many of these acts in connection with the subject of conspiracies in restraint of trade. To go no further back, all the acts of the eighteenth century which forbid combinations in particular trades for the increase of wages, contained also provisions for the regulation fo the trade, and they frequently provided for the punishment

CH. XXX. by a summary procedure of particular offences, such as trifling thefts by workmen of the materials entrusted to them to work up. There would be no particular interest in giving an account of a great number of laws of this kind, nearly all of which have long since become obsolete. I may mention, however, by way of specimen, a single offence which for many centuries was theoretically capital. This was [1] owling or the exportation of wool. This was a felony punishable by 11 Edw. 3, c. 1 (A.D. 1337), by "forfeiture "of life and member," and so grievous was the offence considered that in 1565 it was enacted by 8 Eliz. c. 3, that any one who should export a living ram, sheep, or lamb, should forfeit all his goods, be imprisoned for a year, and at the end of the year "in some open market town, in the "fulness of the market on the market day, have his left hand "cut off, and that to be nailed up in the openest place of such "market." A second offence was felony. The first of these enactments remained in force nominally till 1863, when it was repealed by the Statute Law Revision Act of that year. The statute 8 Eliz. c. 3 was repealed by 3 Geo. 4, c. 41, s. 1.

In very modern times indeed the policy of regulating particular trades, not with a view to any object connected with political economy, but in order to promote the interests of those who are employed in them, has been adopted to a considerable extent, and has in certain cases been enforced by penal enactments. The acts relating to mines and factories afford illustrations of this remark, but the strongest illustration is supplied by the various acts which have since 1854 [2] punished as misdemeanours various breaches of duty by employers towards seamen and by seamen towards their employers or towards each other, and by the master of a vessel when a collision occurs towards the vessel with which he has been in collision.

COMMERCIAL FRAUDS.—The last class of offences relating to trade are commercial frauds. Of these there are two classes which deserve special notice. They are offences

[1] I suppose this means 'ooling, *i.e.* woolling.
[2] See my *Digest*, arts. 394-398.

against the Fraudulent Debtors Act, and frauds by directors and other officers of companies. CH. XXX.

The Fraudulent Debtors Act is the modern representative of a long series of enactments against fraudulent bankrupts, and to understand it, it is necessary to go back to the ancient laws relating to imprisonment for debt. Till our own time the general law relating to arrest for debt was so severe that it is no exaggeration to say that a debtor was treated as a quasi-criminal. To say nothing of arrest on mesne process, a judgment creditor could arrest his judgment debtor upon a writ of *capias ad satisfaciendum*, and keep him in prison till he paid, or if he did not pay, for an indefinite time, indeed for his life. The first great relaxation of this excessive severity (which, as I have already observed, must be borne in mind when we remember the laxity of the common law in punishing many kinds of commercial frauds) was the establishment of the law of bankruptcy, the object of which was to enable a person ruined by misfortunes in trade to be freed from his debts by delivering up for rateable distribution amongst his creditors whatever property remained to him. A long series of statutes were passed upon this subject, the earliest of which was 34 Hen. 8, c. 4, passed in 1542. It was followed by 13 Eliz. c. 7 (1570), and the 1 Jas. 1, c. 15 (1604). These acts provided for the issuing of commissions of bankruptcy to persons who were to realise the bankrupt's estate and divide it. They are slight and imperfect in many respects, and are very lenient towards fraud by bankrupts. As the difficulties and intricacies of the subject manifested themselves by degrees, the legislation on the subject became more elaborate. The first act which punished fraudulent bankruptcy with any severity was 21 Jas. 1, c. 19, s. 7 (1623). The marginal note to the section gives its effect concisely and pointedly: "The bankrupt that fraudu-"lently concealeth his goods" (to the value of £20) "or "rendereth not some just reason why he became bankrupt, "shall be set upon the pillory" (for two hours) "and lose one "of his ears." This continued to be the statutory penalty for fraudulent bankruptcy till the year 1732, when by 5 Geo. 2, c. 30, s. 1, an omission to surrender for six weeks,

CH. XXX. non-compliance with the requisitions of the statute, and in particular the concealment of property to the value of £20, or of papers and books of account, was made felony without benefit of clergy. It is remarkable that Blackstone more than thirty years afterwards observes upon this law, [1] "It is "allowed in general by such as are most averse to the inflic-"tion of capital punishment that the offence of fraudulent "bankruptcy, being an atrocious species of the *crimen falsi*, "ought to be put upon a level with those of forgery and "falsifying the coin."

There is, however, reason to believe that in practice the excessive severity of the law prevented its execution. In 1819, [2] a Select Committee reported on capital punishment, and received the evidence, amongst others, of Mr. Basil Montague. He said that since the act of 5 Geo. 2 had passed—a period of seventy-seven years—"with nearly "40,000 bankrupts I doubt whether there have been ten "prosecutions: I believe there have been only three execu-"tions; and yet fraudulent bankrupts and concealment of "property are proverbial, are so common as to be supposed "almost to have lost the nature of crime."

All through the eighteenth century and down to our own days the law relating to bankruptcy has been elaborated by successive statutes. To say nothing of amending acts and acts which established different courts for the purpose of adjudicating upon bankruptcy cases, the law has been consolidated and re-enacted upon principles more or less differing from each other three several times, namely, first in 1825 by 6 Geo. 4, c. 16; next in 1849 by the 12 & 13 Vic. c. 106, which, in 1861, was so much amended as to be half repealed by 24 & 25 Vic. c. 134, and lastly, in 1869, by 32 & 33 Vic. c. 83, which is still in force. The penal part of the bankruptcy law consisted of provisions for the punishment of bankrupts who did not comply with the provisions of the law in force for the time being. These provisions differed slightly as the system of administering the bankrupt's estate differed,

[1] 4 Bl. *Com.* p. 156.
[2] See extracts from its reports in the *Annual Register* for 1819, p. 336; Mr. Montague's evidence is at pp. 356-359.

but the offences remained substantially unchanged. They consisted in a refusal to submit to the jurisdiction of the court the concealment of property and the concealment or destruction of books and papers. In short, fraudulent bankruptcy, as defined and redefined down to 1861, differed little in substance from fraudulent bankruptcy as defined in 1732. The punishment, however, became by degrees much less severe. By 1 Geo. 4, c. 115, s. 1, the offence ceased to be a capital felony, and became punishable by transportation for life, or any other term not less than seven years, or by imprisonment with or without hard labour up to seven years. This punishment was re-enacted in the first Bankrupt Consolidation Act (6 Geo. 4, c. 16, s. 112), and again in the act of 1849 (12 & 13 Vic. c. 106, s. 251). The act of 1849 for the first time made it an offence punishable with a maximum imprisonment of three years with hard labour to destroy or falsify books, and to obtain goods on credit under the false pretence of carrying on business within three months of bankruptcy, and with intent to defraud the creditor.

The act of 1861 (24 & 25 Vic. c. 134, s. 221) defined the offences which a bankrupt might commit much more elaborately than the earlier acts, but greatly reduced the severity of the punishment, repealing the provisions of the act of 1849 as to felony, and making the offences punishable by three years' imprisonment as a maximum. In 1869, [1] two acts were passed, which not only recast for the third or fourth time the law relating to bankruptcy, but by abolishing imprisonment for debt, and making elaborate provisions for the punishment of fraudulent debtors, added a new head to the criminal law and put an end to the offence of fraudulent bankruptcy properly so called. It must, however, be remarked that the greater part of the offences punishable under the Debtors Act consist in omissions to comply with the provisions of the Bankruptcy Act. All the offences against the act are misdemeanours, except a bankrupt absconding with property, which is felony (s. 12). The maximum punishment in each case is two years' imprisonment and hard labour. [2] Some of

[1] 32 & 33 Vic. c. 62 (the Debtors Act, 1869); c. 71 (the Bankruptcy Act, 1869). See my *Digest*, arts. 387-389. [2] See sec. 13 in my *Digest*, art. 334.

CH. XXX. the offences defined by the act have no reference to bankruptcy proceedings, but consist in obtaining credit by false pretences, and dealing with property intended to defraud creditors.

The old law upon this subject was certainly too severe; but the existing law, I think, is not severe enough. Cases not unfrequently occur in which seven or even ten years' penal servitude would not be too severe a punishment. Fraudulent removal or concealment of property may have all the effects of wholesale robbery or theft, and the very fact that it looks a less outrageous offence and is one which an apparently respectable person may be tempted to commit, is a reason, I think, for punishing it with special severity.

Reckless trading and extravagance involve loss to others, and ought to be punished on the same principle as manslaughter by negligence, and also in order to stigmatize as a crime a dangerous vice. A fraudulent bankrupt should be treated like the worst kind of thief—for such he really is. The provisions of the French law upon this subject seem to me to deserve careful attention. The *Code de Commerce* distinguishes traders unable to meet their engagements into three classes. [1] "Tout commerçant qui cesse ses payements "est en état de faillité." Mere failure involves no penal consequences. The "failli" must, however, be declared a bankrupt if he has lived extravagantly, or speculated rashly, or tried to avoid failure by raising money by buying goods to sell them again under their value, or "si, dans la même "intention, il s'est livré à des emprunts, circulation d'effets, "ou autres moyens ruineux de se procurer des fonds;" or if he has made what we should call a fraudulent preference. [2] In other cases of rash or irregular commercial conduct—for instance, if he has not kept books—an insolvent may be declared a bankrupt. A fraudulent bankrupt is thus defined:— [3] "Tout commerçant failli qui aura soustrait ses livres, "détourné ou dissimulé une partie de son actif, ou qui, "soit dans les écritures, soit par des actes public ou des "engagements sous signature privée, soit par son bilan, se "sera frauduleusement reconnu débiteur de sommes qu'il ne

[1] *Code de Commerce*, 437. [2] *Ib.* arts. 585-6. [3] *Ib.* art. 591.

"devait pas." Simple bankruptcy is punishable by the *Code Pénal* (art. 402) with imprisonment for from one month to two years. Fraudulent bankruptcy must be punished with penal servitude for from five to twenty years.

Of the other offences relating to trade, little need be said. They consist of [1] a series of provisions as to fraudulent directors and other officers of public companies who apply to their own use the property of the company, or keep fraudulent accounts, or destroy books or publish fraudulent statements. These provisions, which experience had shown to be necessary, were first enacted by 20 & 21 Vic. c. 54, in 1857—Sir Richard Bethell's act for the punishment of fraudulent trustees. They now form a part of the Larceny Act.

[1] 24 & 25 Vic. c. 96, s. 81-84. See my *Digest*, art. 350.

CHAPTER XXXI.

MISCELLANEOUS OFFENCES.

Ch. XXXI.

I have now gone through all the principal classes of offences which have a history of their own worth relating. There are many other offences of which it would not be worth while to relate the history, but there are some actions the treatment of which as crimes is of interest because it throws light on different historical events, and on the feelings which prevailed at particular periods of our history. To some of these I will refer in the present chapter. Those which I shall mention are the following, arranged in the order of the date of the times when they were first treated as crimes: maintenance, perjury, slave trading, interference in hostilities between foreigners, bribery.

Maintenance.—The crime of maintenance may be described in general terms as consisting in interfering with the due course of justice. Its more [1] technical definition is narrower though exceedingly vague. It has been the subject of a number of statutes which are still in force, though no prosecution for the offence has taken place within living memory. By the 3 Edw. 1, c. 28 (1275), it is provided "qe nul clerk de justice ne de visconte ne meintenge parties "en quereles." The 13 Edw. 1, c. 49 (1285), is similar. The statute or "ordinance concerning conspirators" (33 Edw. 1, 1305) throws light on the same subject. "Conspirators be "they that do confeder or bind themselves by oath, covenant

[1] See my *Digest*, art. 141. "Maintenance is the act of assisting the "plaintiff in any legal proceeding in which the person giving the assistance "has no valuable interest, or in which he acts from any improper motive." See too Appendix, note viii. p. 346.

"or other alliance, that every of them shall aid and bear the "other falsely and maliciously to indite or cause to indite or "falsely to move or maintain pleas; and also such as cause "children within age to appeal men of felony whereby they "are imprisoned and sore grieved, and such as return men in "the country with liveries or fees for to maintain their "malicious enterprises, and this extendeth as well to the "takers as to the givers; and stewards and bailiffs of great "lords which by their seigniory office or power undertake to "bear or maintain quarrels, pleas, or debates, that concern "other parties than such as touch the estate of their lords or "themselves." The statute 1 Edw. 3, s. 2, c. 14 (1326), hints at least by its recitals at the nature of the offence: "Because the king desireth that common right be adminis- "tered to all persons, as well poor as rich, he commandeth "and defendeth that none of his counsellors nor of his house, "nor none other of his ministers, nor no great man of the "realm by himself nor by other, by wording of letters, nor "otherwise, nor none other in this land, great nor small, shall "take upon them to maintain quarrels nor parties in the "country to the let or disturbance of the common law." The statute 4 Edw. 3, c. 11 (1330) also throws some light on the subject. "Where in times past divers people of the "realm, as well great men as other, have made alliances con- "federacies and conspiracies to maintain parties, pleas, and "quarrels, whereby divers have been wrongfully disinherited, "and some ransomed and destroyed, and some, for fear to be "maimed and beaten, durst not sue for their right nor com- "plain, nor the jurors of inquests give their verdicts, to the "great hurt of the people and [[1] slander] of the law and "common right" the justices are to "inquire, bear, and "determine of such maintainers, bearers, and conspirators."

The provisions of this last statute are substantially re- peated by 20 Edw. 3, c. 4 (1346) entitled "Ordinance for "the justices." In 1377 it was enacted by 1 Rich. 2, c. 4, that none of the king's "counsellors, officers or servants, nor "any other person within the realm of England, of whatsoever "estate or condition they be, shall from henceforth take

[1] See in *Revised Statutes*.

CH. XXXI. "nor sustain any quarrel by maintenance in the country "nor elsewhere upon a grievous pain." It was thought necessary to confirm this act in 1383 by 7 Rich. 2, c. 15.

Another set of statutes were passed in the reign of Richard II. closely connected with the statutes against maintenance. These were the statutes of liveries. The first of these was 1 Rich. 2, c. 7 (1377). It recites that "divers "people of small revenue of land rent or other possessions "do make great retinue of people, as well of esquires as "of other, in many parts of the realm, giving to them hats "and other liveries, of one suit by year, taking of them "the value of the same livery or percase the double value "by such covenant and assurance that every of them shall "maintain other in all quarrels, be they reasonable or un-"reasonable, to the great mischief and oppression of the "people." It then enacts that "henceforth no such livery "be given to any man for maintenance of quarrels or other "confederacies upon pain of imprisonment and grievous "forfeiture to the king, and the justices of assize shall dili-"gently inquire of all them that gather them together in "fraternities by such livery to do maintenance." In 1392 it was enacted by 16 Rich. 2, c. 4, "that no yeoman nor "other of lower estate than an esquire from henceforth shall "not use or bear no livery called livery of company of any "lord within the realm if he be not menial and familiar, con-"tinually dwelling in the house of his said lord," and in 1396 these statutes were affirmed by 20 Rich. 2, c. 1. This act also confirmed the statute of Northampton (2 Edw. 3, c. 3, 1328), which enacted that no one should go armed except on certain specified occasions.

The state of society to which these laws applied is fully described in one of the most interesting passages in Mr. Stubbs's [1] *Constitutional History*. "The English of the middle "ages," he says (I have no doubt with perfect truth), "were "an extremely litigious people." A man who wished to maintain his own rights or attack his "neighbours could "secure the advocacy of a baron, who could and would

[1] Vol. iii. pp. 532-540.

"maintain his cause for him, on the understanding that he "had the rights of a patron over his clients." This led, amongst other consequences, to "the gathering round the "lord's household of a swarm of armed retainers, whom the "lord could not control, and whom he considered himself "bound to protect." This state of things gave the utmost importance to livery. Heraldry was, under Edward III., at its height, as appears from the institution of the Order of the Garter. Less eminent persons followed the king's example by giving badges and liveries, and different kinds of livery were distinguished as livery of company and [1] livery of cloth. Mr. Stubbs [2] observes, "Viewed as a social rather "than a legal point, whether as a link between malefactors "and their patrons, a distinctive uniform of great households, "a means of blunting the edge of the law or of perverting "the administration of justice in the courts, as an honorary "distinction fraught with all the jealousies of petty ambition, "as an underhand way of enlisting bodies of unscrupulous "retainers, or as an invidious privilege exercised by the lords "under the shadow of law or in despite of law,—the custom "of livery forms an important element among the disrup-"tive tendencies of the later middle ages." [3] Mr. Stubbs proceeds to show how the social arrangements of this period rendered maintenance easy and formidable. "In their great "fortified houses the barons kept up an enormous retinue "of officers and servants arranged in well distinguished "grades, provided with regular allowances of food and "clothing, and subjected to strict rules of conduct and account. "A powerful earl like the Percy, or a duke like the Stafford, "was scarcely less than a king in authority, and much more "than a king in wealth and splendour within his own house. "The economy of a house like Alnwick or Fotheringay was "perhaps more like that of a modern college than that of

[1] As a strange instance of the persistence of old customs, I may observe that the Recorder of London still receives—at least the late Recorder, Mr. Russell Gurney, received—from the Corporation of London a certain quantity of scarlet cloth annually, a privilege expressly reserved by 8 Hen. 6, c. 4. See Stubbs's *Constitutional History*, iii. 535, for a summary of the statutes.

[2] *Constitutional History*, iii. p. 536.

[3] *Ib.* vol. iii. pp. 539-541.

CH. XXXI. "any private house at the present day." The lord had his council, his legal advisers, his domestic officers, his exchequer, his retainers. His house was a school for the sons of neighbouring knights and squires, who were themselves frequently bound by express agreements to serve him. They were thus kings, and had courts on a small scale. So long as all these little kingdoms were well and virtuously ruled, they secured to the age in which they existed many social advantages which are altogether wanting in our times; but they were singularly liable to abuse, and when they were abused they threw everything into confusion.

This explains what the offence of maintenance was when the statutes referred to were passed. It was neither more nor less than chronic organised anarchy, striking at all law and government whatever. The history of the times shows how vigorous were the associations by which the members of the small courts described bound themselves to maintain and uphold each others' interests on all occasions against all comers. A king like Edward I. or Edward III., or Henry IV. or Henry V., might by force of character or by great military success enforce the law and put down the breakers of the law; but a weak king—Edward II., Richard II., Henry VI.—was powerless before them, whatever statutes he might pass. The offence of maintenance, or armed anarchy was not finally suppressed till the days of the Tudors, and it is very remarkable that it was then put down, not by new laws, but by the vigorous, unflinching execution of the old ones by a severe court acting under the orders of a succession of kings of unusual force of character, who put themselves at the head of the great movement of the age in which they lived.

The statute 3 Hen. 7, c. 1 (1487), to which I have already referred, provided the means by which the Court of Star Chamber asserted the royal authority so effectually as utterly to put an end to what our ancestors understood by the offence of maintenance. It enacted no new offence, but its first recital is that the king "remembereth how by un-"lawful maintenances, giving of liveries, signs and tokens, "and attainders by indentures, promises, oaths, writings or

"otherwise embraceries of his subjects, untrue demeanings "of sheriffs in making of panels and other untrue returns, "by taking of monies, by juries, by great riots and unlawful "assemblies, the policy and good rule of this realm is almost "subdued." The act then goes on to make the provisions as to the Court of Star Chamber, on which I have already remarked. There is one subsequent statute which relates to maintenance. It is 32 Hen. 8, c. 9 (1540). The change which had been effected by the vigorous administration of the law during the interval of fifty-three years which had passed since the 3 Hen. 7, is strikingly exemplified by the provisions of this statute. It confirms all the old statutes of maintenance, and directs them to be put in force and proclaimed at the assizes, but the whole turn of the statute shows that the type of the crime had changed. Instead of references to conspirators, liveries, and badges, and other forcible perversions or open defiances of the law, the statute deals with the importance of "true and indifferent trials of such titles and "issues as been to be tried according to the laws of this "realm." This object is greatly hindered by "maintenance, "embracery, champerty, subornation of witnesses, sinister "labour, buying of titles and pretensed rights of persons not "being in possession, whereupon much injury hath ensued "and much inquietness, oppression," &c. Provisions are then made against buying and selling "pretensed rights or titles." The old conflict between the law and those who wish to break it by open force is at an end, and fraud, perjury, and chicanery have taken the place of violence.

An exact parallel to this presented itself in every part of India upon, and as the consequence of, the establishment of the British authority. Under native rule a question as to a watercourse, for instance, and irrigation rights would perhaps be languidly carried on before one of the old Zemindari Courts, to a great extent by the agency of punchayats, which had many features in common with juries. The decision of the dispute would be greatly influenced by violence, and it would frequently be settled for a time by a pitched battle between the parties and their friends, which might or might not lead to a blood feud. The invariable result of the establishment of a

CH. XXXI.

government strong enough to put an end to open violence was to produce an outbreak of litigation and a regular trade in suits, "wherefrom" (as in England) "much perjury "ensued," besides "unquietness and oppression" of a different and less formidable type than the old one, but still of considerable importance. It was a common saying in the Punjab some years ago, that the English had set up "pleaderke raj," the rule of the pleaders in the place of the old rule of open violence.

Although maintenance in the old sense of the word is a thing of the past, the name still survives in law books as the name of a crime, but in practice the genus has been lost in the species. The cases of maintenance with which we in these days have to deal are [1] conspiracies to defeat justice which sometimes occur, dissuading witnesses from testifying and perjury—an offence which has a curious history of its own which I now proceed to relate.

[2] PERJURY.—There are a few references to the offence of perjury in the laws of the early kings, but they are very vague and general, though oaths held a prominent place in their scheme of government. These, as appears from the forms [3] given, were oaths asserting not the existence of particular facts, but the goodness of the swearer's cause. "By the Lord, I am guiltless both in deed and counsel of "the charge of which N. accuses me." "By the Lord, the "oath is clean and unperjured which N. has sworn." The minute examination of testimony as to facts stated in detail was not the method by which questions were in those days investigated. Hence the kind of offence to which we in the present day give the name of perjury differs entirely from the perjury which is mentioned in the early laws.

The language used against perjury is extremely general and vague. [4] "Let every injustice be carefully cast out from this "country as far as it can be done, and let fraudulent deeds and "hateful illegalities be earnestly shunned, that is, false weights

[1] See my *Digest*, art. 142, p. 87.

[2] The greater part but not the whole of this account of the law of perjury is taken from Note VII. to my *Digest*, p. 340.

[3] Thorpe, i. 179-185.

[4] *Ib.* 311.

"and wrongful measures, and lying witnesses, and shameful "fights, and horrid perjuries, and diabolic deeds in 'morth,' "works, and in homicides, in theft and in plundering," &c., say the laws of Ethelred and several other legislators with variations. The most definite provision which I have noticed as to perjury is in the [1] laws of King Edward the Elder: "Also we have ordained concerning those men who were "perjurers if that were made evident or an oath failed to them" (*i.e.* if they failed to produce the legal number of compurgators; or when one of the persons produced refused to join in the oath), "that they afterwards should not be oath-worthy "but ordeal-worthy."

Perjury thus appears in very early times to have been not so much a lie told about a specific matter of fact in a witness box, as a false oath taken in a case in which the matter at issue was decided by the oaths of the persons interested and their compurgators. As I have shown in the earlier part of this work the decision of cases by the detailed examination of witnesses, and the crimes which arise out of that mode of procedure, were unknown until a comparatively modern period in our history, and, on the other hand, the process of deciding cases by ordeal, by compurgation, or by combat, left deeper traces in our history than is usually supposed.

After the Conquest the ordeal and compurgation were gradually superseded by the institution of the jury, who, as I have shown at length, were at first witnesses rather than judges. The twelve men of the vicinage who swore before the justices that such a person was guilty or not of such an offence, were a step in advance of compurgators or the proceedings of an ordeal, but they differed widely from modern jurymen. We find, accordingly, that in early times, and indeed for several centuries, the only perjury of which the common law took notice was the perjury of jurors, and this was punished, not as a substantial offence, but as an incidental result of the process called "attaint," the main object of which was to set aside a false verdict in certain kinds of actions. It thus affords an instance of the blending of civil and criminal

[1] Thorpe, i. 161. Edward the Elder, 3.

CH. XXXI. consequences in a single proceeding, which, as I have already observed, was not an uncommon characteristic of our early criminal law. Three curious passages in [1] Bracton, [2] Fleta, and [3] Britton, are to much the same purpose. The passages are too long to quote, but they contain careful distinctions between verdicts which are merely mistakes and those which are wilfully false, those in which the blame attaches to the jury and those in which it attaches to the judge. Incidentally they throw great light on the respective provinces of the judge and the jury. They assume, however, throughout that the proper function of the jury was that of established and, so to speak, representative witnesses, who, of course, would be guilty of a grave offence if they perjured themselves. The punishment, accordingly, if their verdict was set aside on the ground of perjury, was, as stated by Fleta, very severe. "Imprimis capiantur et in gaolam detrudantur, et omnes "terræ et omnia catalla in manum Regis capiantur, et extra "manum suam capiantur cum perpetua infamia, per quam "lege libera deincips non poterint congaudere, quorum sacra-"mentis veredictis nunquam erit aliquatenus fides adhibenda." Lord Coke, who refers to these passages in a cursory and unintelligent way, observes that this punishment "was so severe "as few or no juries were upon just cause convicted." The fact probably is that the process of attaint, was objectionable on many obvious grounds. In the first place no one jury would ever attaint another lest they might be themselves attainted; moreover, as the juries, by the steps already described, ceased to be witnesses and became judges of the fact, attaints would obviously become inapplicable and inappropriate. Moreover the process of attaint, which was at all times intricate and clumsy in the extreme, fell into disuse, and other ways of reversing a verdict were adopted.

The real singularity is, that for several centuries no trace is to be found of the punishment of witnesses for perjury. The only passage in an early book bearing on this offence which I have been able to find, besides those in Bracton and

[1] Bracton, lib. iv. ch. iv. pp. 288*b*-290*b* (in Sir H. Twiss's edition, vol. iv. pp. 388-415.)
[2] Fleta, 22.
[3] Britton, lib. iv. tract v. ch. ix. vol. ii. p. 212 (Nicholls' ed.)

Fleta already referred to, is in the *Mirror*. The passage is as follows: [1] "Perjury is a great offence of which ye are to "distinguish either of perjury of false testimony, or by breach "of faith, or by breach of the oath of fealty: Of the first "perjury ye are to distinguish either of perjury mortal or "venial: if of mortal, then the judgment was mortal to the "example of apparent murderers." This passage, however, stands alone. In an earlier [2] chapter the author treats perjury as consisting exclusively of breaches of promissory oaths by the officers of the king's house to do their duty. It is difficult to prove a negative as to the contents of the Year Books, but I do not think they contain any reference to this offence. There is no such title as "Perjury" in Broke's Abridgment. One case only is referred to in Fitzherbert, under the title "Parjure." In this instance a man was fined and imprisoned for representing his property as greater than it really was when he offered himself as bail, which might be regarded as a contempt of court. The subject is not mentioned either by Staundforde or Lambard, nor in the original edition of Dalton's *Justice*. Perjury was no doubt regarded as a spiritual offence. [3] Several cases of prosecutions for it are to be seen in Archdeacon Hale's *Ecclesiastical Criminal Precedents.* Most of them refer to matters of ecclesiastical cognizance, such as incontinence, but one relates to a common transaction of business. "Johannes Traford "notatur super crimine perjurii, eo quod non solvit M. R. "Spencer [blank in the original], quos promisit solvere." This procedure was jealously watched by the courts of common law. [4] Two cases occur in the Year Books in which a prohibition went to the spiritual court to restrain them from inquiring into false oaths, or rather breaches of promissory oaths relating to temporal matters, upon the ground that such an inquiry was an indirect way of determining spiritual questions. In the second of the cases referred to the report says, "It happened in the King's Bench that a man had "sworn to make a feoffment of land, and for not doing so he

[1] Bk. ii. s. 19, p. 208.

[2] Ch. i. s. 5, p. 18.

[3] Nos. 75, 77, 93, 131, 146, 147, 200.

[4] 2 Hen 4, p. 10, No. 45; and 11 Hen. 4, p. 88, No. 40.

CH. XXXI. "was prosecuted in the Court Christian as for perjury, and "because by this means he might be forced to perform a "thing touching land and inheritance, the same course was "taken as if he had been sued for the land itself in the "Court Christian," *i.e.* a prohibition was granted.

It is not at all improbable that this strange defect in the law may have had an influence upon the prevalence of perjury, which Mr. Hallam notices as one of the most characteristic vices of the middle ages.

The first statutory reference to perjury, as far as I know, is to be found in the statute 3 Hen. 7, c. 1, on which I have already remarked.

This statute recites the bad effects of various crimes, and enumerates "the increase of murders, robberies, perjuries, "and unsureties of all men living" as their effect. It then proceeds to give the court power to call before them "the "said misdoers." The Star Chamber considered that this authorised them to punish perjury, though the words seem not to bear that interpretation. It certainly did not authorise them to punish murders or robberies. Temporal penalties were first imposed upon the offence by the statute 32 Hen. 8, c. 9, s. 3 (1540), which punished subornation of perjury in certain cases by a fine of £10, but left perjury itself unpunished. The money was to be sued for by a common informer. This was followed in 1562 by the 5 Eliz. c. 9, which punishes subornation of perjury in certain special cases and courts with a penalty of £40, and perjury itself with a penalty of £20. In each case there is an alternative punishment of six months' imprisonment and pillory in case of nonpayment, besides certain incapacities. These enactments obviously regard perjury simply as a branch of the general offence of maintenance or oppression by iniquitous lawsuits.

An account of the law upon perjury as it stood in the tenth century is given in the case of Devonport *v.* Sympson, Cro. Eliz. 520, decided in 1596. This was an action against a man who falsely swore that the value of certain plate was only £180, and not £500, whereby the plaintiff recovered less damages for the loss of the plate than he was entitled to.

The jury gave £300 damages. "And it was moved in arrest "of judgment that the action lay not; for the law intends the "oath of every man to be true; and, therefore, until the statute "of 3 Hen. 7, c. 1, which gives power to examine and punish "perjuries in the Star Chamber, there was not any punishment "for any false oath of any witness at the common law: and "now there is a form of punishment for perjury provided by "the statute of 5 Eliz. c. 9. And if this action should be "allowed, the defendant might be twice punished, viz., by the "statute, and by this action, which is not reasonable. And of "that opinion were Walmsley, Beaumond, and Owen, that this "action lies not; for at the common law there was not any "course in law to punish perjury: but yet before the statute "of 3 Hen. 7, c. 1, the king's council used to assemble and "punish such perjuries at their discretion. And if he should "be punished by law by this action, there would be some pre-"cedent of it before this time: but being there is not any "precedent found thereof it is a good argument that the action "is not maintainable. And it appears by Dyer, 242, that at "the common law there was no punishment for perjury but in "case of attaint; but in the spiritual court *pro læsione fidei* in "cases spiritual they used to punish them; and here they "would in this action draw in question the intent of the jurors "what greater damages they would have given, unless for this "oath, which is secret, and cannot be tried; and therefore "to punish a man for his oath upon a secret intent would be "hard; and if this might be suffered, every witness would be "drawn in question. Wherefore upon these reasons they held "that this action lay not, and gave judgment for the defendant, "against the opinion of Anderson, who conceived the action "was maintainable."

The present law upon the subject, which is to be found in all the common text-books, is represented by article 135 in my *Digest*. It originated entirely as far as I can judge in decisions by the Court of Star Chamber. Since writing the note to my *Digest*, from which the preceding observations on perjury are taken, I have found an account of this remarkable instance of judicial legislation in [1] Hudson's account of

[1] Hudson's Treatise, pp. 71-82.

CH. XXXI. the Court of Star Chamber, which seems to me extremely curious. Hudson begins by saying that the case quoted above from Dyer is wrong. "I cannot but marvel that so "learned and reverend men should light upon so fond an "opinion, whereas I dare undertake to show them that the "common law of England had a punishment for perjury "before the Conqueror, and when a certain number of learned "men, to the number of twelve, in every shire, were ap-"pointed to set down their laws, which they performed "accordingly, and declared the punishment of perjury, as "Roger Hoveden remembereth."

As I have already observed, there are some references to perjury in the ancient laws, but Hudson mentions no other case in which perjury was punished before the reign of Henry VIII. He observes, however, that "in the reigns of "Henry VII., Henry VIII., Queen Mary, and the beginning "of Queen Elizabeth's reign, there was scarcely one term "pretermitted, but some grand inquest or jury was fined for "acquitting felons or murderers, in which case lay no attaint." He then gives nine instances, the earliest 4 Hen. 8 (1513), and the last in 22 Eliz. (1580), in which jurors were fined by various courts for what were regarded as wrongful acquittals, one of the cases being that of Throckmorton. He concludes, "all which (it must be agreed) were injuriously "punished contrary to the law of the land, if their opinion "were true that there was then no law to punish perjury: "besides the horrible imputation which should be upon the "government that so detestable a crime as perjury should be "privileged in this kingdom with impunity." It would be impossible to give stronger proof than Hudson's own statements supply of the truth of the proposition which he denies, for in the first place only one of the cases which he mentions is a case of perjury by a witness. Nearly all the rest are cases of alleged perjuries by jurors. In one a man was punished for a false oath, which was regarded as a contempt of court; in another case, "Buckett, being examined in "open court upon a question asked him, and his oath "being afterwards disproved, was sentenced to the pillory." Moreover, all these cases were punished, not by the known

law of the land, and according to a regular course of proceeding, as for a known offence, but by an arbitrary punishment imposed by the court, which was offended at the verdict or false oath.

Hudson goes on to give some curious records of long forgotten classes of cases which show by what slow degrees the conclusion that all perjury in a judicial proceeding is a crime was arrived at. It came to be established by successive steps that perjury in an ecclesiastical court, perjury in the Stannary Court, and perjury in the Court of Chancery were punishable in the Star Chamber. "A long "debated question hath been whether perjury committed "by any witnesses upon indictments for the king shall be "examined and punished in the Star Chamber. And the "reason yielded hath been for that it will deter the king's "witnesses to yield their testimonies in all cases." After noticing some cases in 1574 and 1582 to the contrary he says: "But later times and manifest corruptions of witnesses "in the king's case hath had a settled course of punishing "perjury, even in witnesses for the king." There was, he says, some doubt whether "after sentence given upon the "testimony of witnesses those witnesses shall be afterwards "questioned for perjury? for that if their depositions be false "it overthroweth the sentence." It was, however, decided in the affirmative, "for that otherwise wicked and perjured "persons might ruinate any man." This wholesome rule was, however, subject to what, according to our ideas, seems a monstrous exception. "Another perjury not punishable nor "examinable is perjury committed against the life of a "man for felony or murder whereof the party accused is con-"victed by verdict and judgment, and this perjury hath not "been allowed to be examinable; and one reason is lest it "should deter men from giving evidence for the king, and "another lest it should bring a public scandal upon the justice "of the kingdom if the cause of a person so committed should "receive new examination; the nature of man being to com-"passionate the worst men in such extremities and to pick "small occasions to try a witness in any circumstance that "might tend to make a guilty man seem innocent." He

CH. XXXI. thinks, however, that as witnesses may be tried for perjury committed even before the Star Chamber itself, "so in "strictness of reason the other" (viz., perjury by which a man is hanged) "may after sentence receive examinations, and it "is forborne, but only in discretion, that when a man is "executed the truth of his accuser's testimony may not be "examined, because the execution cannot be reversed." This is all summed up by [1] Coke, who says shortly that "in Mich. "10 Jas. (1613) in the Star Chamber in the case of Rowland "ap Eliza" (Hudson calls him Ap Ellis) "it was resolved "that perjury by a witness was punishable by common law." Coke's account of the law of perjury is a good illustration of the unintelligent patchwork way in which he writes on all subjects.

For the modern doctrine on the subject I must refer to my *Digest*. The offence is [2] punishable under 2 Geo. 2, c. 25, s. 2.

The doctrine connected with the subject, that the matter falsely sworn must be material to the issue, has a curious history. It is part of the definition of the offence given by Coke. In explaining that part of his definition which says that the false oath must be "in a matter material to the issue or cause in question," he adds, "for if it be not material, then, "though it be false, yet it is no perjury, because it concerneth "not the point in suit, and therefore in effect it is extra- "judicial. Also this act" (he seems to refer to 5 Eliz. c. 9, which, however, does not contain the words introduced into his definition) "giveth remedy to the party grieved, and if the "deposition be not material, he cannot be grieved thereby. "And Bracton says, '*Si autem sacramentum fatuum fuerit,* "'*licet falsum, tamen non committit perjurium.*'" Coke misunderstands Bracton, for Bracton goes on to say, "quia jurat "secundum conscientiam eo quod non vadit contra mentem," which shows that he was not speaking of wilful falsehood in an immaterial point, but, as appears from many other places in the same passage, of cases of honest mistake. Bracton's authority, therefore, does not warrant Coke's observation, besides which it refers not to witnesses but to jurors.

[1] *Third Institute*, pp. 162-167.

[2] See my *Digest*, art. 137.

Probably this part of Coke's definition was an adaptation of a part of the old law of attaint, which is thus expressed in the case of Foster *v.* Jackson (Hobart, 53), also decided in 1613: "If the jury find anything that is merely out of the "issue, that such a verdict for so much is utterly void . . . . "If that extravagant part of the verdict be false, it is no "perjury, neither doth any attaint lie upon it, for there is no "party grieved, nor anything to be restored, neither can it be "used as evidence in any other trial, because there is no "redress if it is false." This is intelligible and rational, but the modern doctrine of materiality is a mere distortion of it. It is one thing to say that a verdict is not to be treated as false because an immaterial part of it is false, and quite another to say that a wilful perjury about a particular fact is not to be punished because the fact is not material to the issue. However, upon this passage of Coke's a variety of cases were decided (see 1 Hawkins, *P. C.* 433-5), which introduced a doubt whether perjury could be committed about a fact which, though relevant to the issue, was not essential to its determination, and the doctrine became so well recognised as a part of the law, that an averment of the materiality of the matter on which perjury is assigned forms a necessary part of every indictment for the offence. [1] Of late, however, the judges have given so wide an interpretation to the word "material" that the rule has ceased to do much harm. It is difficult to imagine a case in which a person would be under any temptation to introduce into his evidence a deliberate lie about a matter absolutely irrelevant to the case before the court. A way of interpreting the law as to materiality was suggested by Maule, J., in [2] R. *v.* Phillpot which would practically get rid of the doctrine altogether. He said, "Where the defendant by means of a false oath "endeavours to have a document received in evidence, it "is, therefore, a false oath in a judicial proceeding. *It is* "*material to that judicial proceeding, and it is not necessary* "*it should have been relevant and material to the issue being* "*tried.*"

I may observe in conclusion that many enactments provide

[1] See particularly R. *v.* Gibbons, L. & C. 109.

[2] 2 Den. 306.

CH. XXXI.

that the making of false declarations upon oath or affirmation in relation to particular matters shall be deemed to be perjury. It does not fall within the plan of this work to notice them.

BRIBERY.—The offence of bribery and the manner in which it has from time to time been dealt with are subjects of considerable interest, as they mark the steps by which corruption descended in the social scale, and from having been practised by great officers of state came to be the characteristic offence of voters for boroughs and counties. It is a subject of legitimate pride that at no time of our history has it been found necessary to make any definite provision against judicial corruption, though there can be no doubt that such conduct is an offence at common law and would, if committed, be deservedly followed by severe punishment. There is, however, no statute against it. It was, indeed, enacted by the 8 Rich. 2, c. 3 (1384), that no judge of the King's Bench or Common Pleas, or Baron of the Exchequer, should take from thenceforth "robe, "fee, pension, nor reward of any but the king, except reward "of meat and drink of small value," nor "give counsel to "any, great or small, in things and affairs wherein the king "is party or which in anywise touch the king, and that they "be not of any man's counsel in any cause, plea, or quarrel "hanging the plea before them, or in other of the king's "courts." This statute was repealed in 1881 by the [1] Statute Law Revision Act; why, I cannot say. [2] Coke quotes a statute from the Parliament Roll of 11 Hen. 4 (1410), which provides that "Nul chancelor, treasorer, garden del privie seal, "counselor le roy, sernts, a councell del roy, ne nul auter "officer, judge, ne minister le roy pernants fees ou gages de roy "pur lour ditz offices ou services, presigne en nul manner en "temps a vener ascun manner de done ou brocage de ulluy "pur lour ditz offices et services a faire." This, he says, was never printed.

[1] 44 & 45 Vic. c. 59. The same act opens a door to oppressions by the "con-"stable and marshal of England," but as these officers no longer exist, it does not much matter.

[2] *Third Institute*, p. 146. It is printed in 3 *Rot. Par.* 626 with this marginal note: "Resp'atur" (I suppose "respectatur," it is respited or adjourned) "per D'num principem et Concilium."

He gives two instances in which judges were punished for taking bribes, namely, Sir William Thorpe in 1351, who took sums amounting in all to £90 for not awarding an exigent against five persons at Lincoln Assizes, and certain commissioners (probably special commissioners) of Oyer and Terminer, who were fined 1000 marks each for taking a bribe of £4; I have [1] elsewhere referred to the impeachment of the Chancellor Michel de la Pole by Cavendish, the fishmonger, for taking a bribe of £40, three yards of scarlet cloth and a quantity of fish, in the time of Richard II.

These authorities show that, rare as the offence was, judicial corruption was regarded as an offence long before the case of Lord Bacon.

[2] Lord Bacon's case is of great historical interest, but regarded merely as a legal precedent it shows only that judicial corruption is an offence punishable on impeachment. He pleaded guilty to corruption in plain unequivocal terms, and was sentenced to a fine of £40,000, imprisonment during the king's pleasure, incapacity to be employed, and exclusion from parliament.

Bacon's case was followed at an interval of four years by

[1] Vol. I. p. 151.

[2] "Upon advised consideration of the charge descending into my own "conscience, and calling my memory to answer, so far as I am able, I do "plainly and ingenuously confess that I am guilty of corruption; and do "renounce all defence, and put myself upon the grace and mercy of your "lordships."—Spedding's *Life of Bacon*, vii. 252. Mr. Spedding's remarks on the case I cannot here discuss, but they seem to me to proceed upon an entire misconception of the law, and upon a rule as to estimating the facts altogether arbitrary and unreasonable. "Corruption includes acts of various "complexions, varying from violations of universal morality of the blackest "dye, to violations only of artificial and conventional regulations, made to "defend the outworks of morality, acts illegal rather than immoral; and as "the judges neither made any attempt themselves to draw such distinctions, "nor placed on record any of the evidence which would enable us to do so, "*we are compelled to fall back upon Bacon himself as being really our only* "*authority, and to hold him guilty to the extent of his own confession and no* "*further. From the manner in which the case was tried it is impossible to re-* "*gard anything else as proved.*" It seems to me, that the strong probability is, that Bacon did the best he could for himself, and that the very object of his general admission of corruption was to get the opportunity of giving an account of the details which it would not be worth while to contradict. I have no doubt that he took bribes in the plain sense of the words, *i.e.*, that he allowed himself to be influenced in his judgments either by gifts or by the expectation of receiving them. If his statement did not mean that, it was an act of abject cowardice. If it did, his account of the details must be a disingenuous, incomplete statement, a conclusion which is in no respect improbable.

CH. XXXI. that of the Earl of Middlesex, Lord High Treasurer, who, for refusing to hear petitions referred to him till he had been bribed, was fined £50,000 and sentenced to be imprisoned during pleasure.

Lord Macclesfield was also [1] impeached and removed from his office for bribery in 1725. The cases of Lord Melville, of Mrs. Clark's charges against the Duke of York, and the scandals which led to the retirement from office of Lord Westbury in 1865, cannot be called cases of bribery, but are illustrations of the extreme, though by no means excessive, importance attached in this country to everything which remotely suggests a suspicion of corrupt practices in persons of high station, especially of high judicial station, or even in persons connected with them. The matter is indeed one as to which it is impossible to be too jealously and scrupulously sensitive. One remarkable instance of the length to which this sentiment has been carried is supplied by an [2] enactment still in force which provides that "the "demanding or receiving any sum of money or other valuable "thing as a gift or present . . . . by any British subject "holding any office under his Majesty . . . . in the East "Indies shall be deemed and taken to be extortion and a mis-"demeanour at common law." These words are wide enough to make it a misdemeanour to give a wedding present to an Indian civilian, or for an author to send to a civilian a presentation copy of a new book. Of course the act would not be so interpreted, but there might be some difficulty in explaining it away, especially as s. 63 provides that barristers, medical men, and chaplains may, nevertheless, take fees in the way of their respective professions. If, but for this, such fees would have been forbidden, it is hard to say that any presents were not intended to be included.

The kind of corruption against which the greatest amount of legislation has been directed is corruption at parliamentary elections. Bribery at [3] parliamentary elections is said to have been an offence at common law, but, if it was, the common law has long since been superseded by statutes which by

[1] 16 *State Trials*, p. 767.

[2] 33 Geo. 3, c. 52, s. 62.

[3] 1 Hawkins, p. 415.

very slow degrees have defined the offence clearly and completely. The growth of the definition is of interest, both because of its connection with the subject of parliamentary elections, and because it would be difficult to find anywhere a better illustration of the care and experience necessary in so defining offences as to include all conduct of substantially the same character and nothing else. It is a matter which ought to be carefully borne in mind by those who suppose that such an offence as murder, for instance, can be defined in a single short sentence by a few pointed words.

The first statute directed against bribery in parliamentary elections was 2 Geo. 2, c. 24, passed in 1729. Section 7 of this act subjected to a penalty of £500 (1) every voter who asked, received, or took any money, or other reward, by way of gift, loan, or other device, or who agreed for any gift, office, employment, or other reward whatsoever, to give his vote or abstain from voting; and (2) every person who, by himself or through an agent, by any gift or promise corrupted or procured any person to vote or abstain from voting. This provision left unpunished all payments for having voted and all corrupt practices except giving or promising "money or "other rewards," and all gifts to other persons than voters. It remained unaltered, however, for eighty years, when it was reinforced by 49 Geo. 3, c. 118, passed in 1809. This act recites that it is not bribery within the act of George II. to give or to procure to be given, or to promise to give or procure to be given, any sum of money, gift, or reward, or any office, place, employment, or gratuity in order to procure the return of any member to serve in parliament, unless the consideration is given to a returning officer or voter. It then proceeds in two elaborate sections to subject to a penalty of £1,000 all persons who directly or indirectly give any such consideration to any one in order to procure the return of any person to parliament, and all those who receive it to a penalty of £500. This act did not cover the case of retrospective payments. It was not provided for till 1842, when it was enacted by 5 & 6 Vic. c. 102, s. 20, that the payment or gift of any sum of money or other valuable consideration whatsoever, to any voter before, during, or after any election,

CH. XXXI. or to any person on his behalf, or to any person related to him by kindred or affinity, on account of his having voted or having refrained from voting, or being about to vote or refrain from voting, whether under the name of head-money or otherwise, should be deemed to be bribery. No special penalty for bribery was provided by this act, though the effect of the section quoted was to render void the election of any person guilty of the practice in question.

At last, in 1854, was passed the Corrupt Practices Act now in force, 17 & 18 Vic. c. 102. The penalties imposed by it have been by some regarded as insufficient, but no fault can be found with the definitions which it contains. It begins by defining bribery under five separate heads, of which I quote the first as a specimen.

"The following persons shall be deemed guilty of bribery "and shall be punishable accordingly:—

"1. Every person who shall directly or indirectly, by himself "or by any other person on his behalf, give, lend, or agree "to give or lend, or shall offer, promise, or promise to "procure or to endeavour to procure, any money or valuable "consideration, to or for any voter, or to or for any person "on behalf of any voter, or to or for any other person, "in order to induce any voter to vote or refrain from "voting, or shall corruptly do any such act as aforesaid on "account of such voter having voted or refrained from voting, "at any election."

I do not think it would be possible to define either more completely or in fewer words the particular forms of bribery intended to be forbidden by this provision. It may strike a hasty or superficial reader as wordy or tautologous, but if any one tries the experiment he will find that not a word of it could be spared.

The four remaining heads of the offence relate to (2) bribery by offices or employments; (3) bribery to induce persons to procure the return of a member or the vote of a voter; (4) the acceptance of bribes; (5) advancing or paying money to be used in bribery.

The fourth and fifth heads of the definition are carried somewhat further by the following section.

Bribery by this act is made a misdemeanour. In 1872 the provisions of the act were extended to municipal elections by 35 & 36 Vic. c. 60. CH. XXXI.

[1] Treating was by the same act subjected to a penalty of £50, recoverable in a penal action, and intimidation (widely defined) was made a misdemeanour by s. 5. I do not think that this practice had been ever before subjected to any statutory punishment.

SLAVE TRADING.—The crime of slave trading has, in a legal point of view, hardly any history, but the suppression of the slave trade was a memorable transaction, and the laws by which it was branded as a crime of the greatest enormity form an essential part of that history.

Of the long agitation against first the slave trade, and then slavery itself, I shall say only a few words. It is said that in 1786 there were in the trade 130 ships, which carried 42,000 slaves. In 1787 was formed the Society for the Suppression of the Slave Trade. The matter was debated in parliament in 1791, and again in 1798, but Mr. Wilberforce, who brought the matter forward, failed to get a majority. Down to 1806, the slave trade continued to be legal, but from that time a series of acts was passed, which by singularly rapid steps changed its character from that of a lawful trade to a capital crime.

The first act for the abolition of the slave trade was passed in 1806 (46 Geo. 3, sess. 2, c. 52). The act forbids in an elaborate way, and subject to some temporary exceptions, all trading in slaves either between Africa and the West Indies, or between one West Indian colony and another, or between colonies and foreign countries, the penalty being forfeiture of the ship, and of £50 a head for the slaves on board. All slave trading contracts, and the insurance of slave ships were forbidden under heavy money penalties.

In 1807, an act (47 Geo. 3, sess. 1, c. 36) was passed which greatly increased the severity of the act of 1806, including a larger number of cases and inflicting much heavier

[1] 17 & 18 Vic. c. 102, s. 4. It had been made a corrupt practice by 5 & 6 Vic. c. 102, s. 22, and 4 Geo. 4, c. 55, s. 79, and had been forbidden by 7 Will. 3, c. 4, s. 1 (referred to by mistake as 7 & 8 Will. 3, c. 25, in 5 & 6 Vic. c. 102, s. 22).

CH. XXXI. penalties in respect of them. It declared that from May 1, 1807, "the African slave trade . . . . shall be . . . . abolished, "prohibited, and declared to be unlawful."

In 1811, a still more severe act was passed (51 Geo. 3, c. 23), which made slave trading felony, punishable with fourteen years' transportation, and the serving on board a slave ship or insuring the vessel a misdemeanour punishable with imprisonment up to two years. After [1] several administrative provisions, and [2] acts of parliament intended to carry into effect treaties for the suppression of the slave trade made with Spain, Portugal, and the Netherlands, the then existing law was consolidated and amended by [3] 5 Geo. 4, c. 113. This is a most elaborate and comprehensive act. It enumerates every sort of act or contract which can in any way be regarded as constituting or as being auxiliary to slave trading. It first declares all such acts and contracts to be illegal, and then in a series of clauses imposes ruinous money penalties in the way of fine and forfeiture on all persons who are concerned in any of them in any capacity, and on all their "procurers, counsellors, aiders, and abettors." It then proceeds to declare in equally comprehensive language that every person guilty of slave trading at sea "shall be deemed "and adjudged guilty of piracy, felony, and robbery, and, "being convicted thereof, shall suffer death without benefit "of clergy, and loss of lands, goods, and chattels, as pirates, "felons, and robbers upon the sea ought to suffer." The amplitude, energy, and indignation of the words are very characteristic of their author. Many other acts of slave trading are declared to be felony, and punished by fourteen years' transportation; and serving on slave ships is made a misdemeanour, subjecting the offender to two years' imprisonment. Capital punishment for this offence was taken away

[1] 54 Geo. 3, c. 59; 55 Geo. 3, c. 172; 58 Geo. 3, c. 49; 59 Geo. 3, c. 120, and c. 97.

[2] 58 Geo. 3, c. 36 (Spain); 58 Geo. 3, c. 85 (Portugal), and see 59 Geo. 3, c. 98; 59 Geo 3, c. 16 (Netherlands).

[3] An imperfect act to the same effect was passed in the same session, c. 17. The act 5 Geo. 4, c. 113, was drawn by my father, and was dictated by him in one day and at one sitting. It consists of fifty-two sections, and fills twenty-three closely-printed octavo pages. Many of the sections are most elaborate. For the effect of the act, so far as it creates offences, see my *Digest*, arts. 113-117.

in 1837, by 1 Vic. c. 81, s. 1, but in other respects the law has remained unaltered since 1824. CH. XXXI.

It is remarkable that the offence of kidnapping is not punishable otherwise than under this act or as a common law misdemeanour, except in the case of children under fourteen (see 24 & 25 Vic. c. 100, s. 56), in which case it is punishable with seven years' penal servitude as a maximum. This, I think, is a real defect in the law. The Draft Criminal Code did not propose to punish it.

Two acts, called the Kidnapping Acts, 1872 (35 & 36 Vic. c. 19), and 1875 (38 & 39 Vic. c. 51), relate only to the kidnapping of natives of the Pacific Islands; and though the first-mentioned act (s. 9) makes certain offences felony, punishable with the highest secondary punishment, it seems doubtful whether the offenders can be tried in England, as the act says they may be tried in any "Supreme Court of "Justice" in Australia or New Zealand, to which the act of 1875 (s. 8) adds Fiji.

INTERVENTION IN FOREIGN HOSTILITIES.—The history of the law relating to the offence of private interference in foreign hostilities possesses considerable interest, and connects itself in a striking way with the changes which have in course of time taken place in the views taken of war by the public opinion of this country.

I am not aware of any evidence to show that till modern times the act of taking part in foreign hostilities was regarded as criminal [1] unless the act involved some breach of duty towards the king. Indeed, the whole spirit of the feudal system was favourable to the notion that it was right and natural for soldiers to seek service wherever they could find it. The case of the Free Companies which ranged all over Europe in the latter part of the fourteenth and early in the fifteenth century is well known, and [2] Froissart is full of such stories.

[1] For an instance, see the case of Nicholas de Segrave, referred to in Vol. I, p. 146.

[2] The most striking perhaps is the account which he gives of the adventures of Le Bastot de Mauléon, whom he met in 1388 at the Court of the Count of Foix. This story clearly shows that at that time natives of all countries took part in wars, and often carried on war on their own private account, all over Europe.—Froissart, by Johnes, ii. pp. 101-106.

CH. XXXI.

At a later time, and especially through the wars of the sixteenth and seventeenth centuries, all countries had mercenary troops in their service, and there is abundant proof that large numbers of English, Scotch and Irish, took part, without being supposed to do anything objectionable legally or morally, in the wars then in progress. There were, for instance, a large number of British, and especially of Scotch, troops in the army of Gustavus Adolphus.

The first occasion on which parliament recognised and interfered with such practices was in the year 1605, when was passed 3 Jas. 1, c. 4, "An Act for the better discovery and "repressing of Popish recusants." This was one of the most severe acts ever passed against the Roman Catholics, and was one of several statutes produced by the excitement caused by the gunpowder treason. The eighteenth section begins by a recital that it is found "by late experience that such as go "voluntarily out of this realm of England to serve foreign "princes, states, or potentates, are for the most part perverted "in their religion and loyalty by Jesuits and fugitives with "whom they do most converse." It went on to enact that every one who should go out of the realm to serve any foreign prince, state, or potentate, should be a felon, unless he first took the oath of obedience—an elaborate test provided by the act for many purposes—and entered into a bond not to be reconciled to the pope, or plot against the king, but to reveal to him any conspiracies which should come to his knowledge. This statute assumes that to take foreign service is in itself lawful, though it attaches conditions to it which were at that time considered necessary.

In 1736, an act was passed (9 Geo. 2, c. 30) which made it felony without benefit of clergy to enlist, or procure any person to go abroad to enlist, in the service of any foreign prince, state, or potentate, as a soldier. In 1756, an act was passed (29 Geo. 2, c. 17) which somewhat enlarged the terms of the act of 1736, in order to bring within it practices by which it had been evaded. It also specifically enacted in addition that it should be felony without benefit of clergy to [1] "enter into the military service of the French

[1] Like Roderick Random, for instance.

"king."[1] In the debate on the Foreign Enlistment Act of 1819, Sir James Mackintosh said that "these acts were "merely intended to prevent the formation of Jacobite armies "in France and Spain." It was also asserted by[2] Sir Robert Wilson that the acts "remained during all times a dead letter "on the statute book." He stated that prisoners taken from the Irish brigade at Fontenoy, Dettingen, Minden, and Culloden, were treated not as criminals, but as prisoners of war. He also said that "at one period, out of 120 companies of "Austrian grenadiers, seventy were commanded by Irish "officers," and that, when the officers of the Irish brigade refused to serve the republic after the revolution, they were received into the British service, and five or six regiments were embodied and put under their command. In short, down to the end of the eighteenth century it was not in practice considered improper for persons who were so disposed to seek military service where they pleased, and writers on international law maintained that neutral nations were under no obligation to belligerents to prevent neutral subjects from engaging in the service of either belligerent as they might feel disposed.

The first great instance in which a different view was acted upon by any nation was in the case of the United States upon the outbreak of the war of 1793. [3] Mr. Jefferson in his letter to M. Genet justified the refusal of the United States to allow any of the belligerent powers to equip, arm, or man vessels of war, or to enlist troops in the neutral territory, on the ground that the States were at peace with all the belligerents, and that therefore the citizens of the States were not at liberty to exercise acts of war against any of them. "For the citizens of the United States, then, to commit "murders and depredations on the members of other nations, "or to combine to do it, appeared to the American Govern-"ment as much against the laws of the land as to murder or "combine to murder or rob their own citizens."

An act of Congress was passed in 1794, and was revised and re-enacted in 1818, which gave effect to these principles by

[1] *Ann. Reg.* for 1819, p. 72. [2] Hansard, xl. 869-870, June 3, 1819.
[3] Wheaton, by Boyd, 1878, p. 508, quoting from American *State Papers*, vol. i. p. 155.

CH. XXXI. making it a misdemeanour to do acts within the United States intended to aid belligerents in their operations. It is obvious that this view of the subject rests upon quite a different conception of war from that which had moulded the views of most European states—the law of England in particular—up to that time. Jefferson's despatch regards the act of an American who joins the French or English in fighting the English or French in the same light as that of an American citizen who kills an Englishman or Frenchman whilst there is peace between the United States and France and England.

These views were not recognised or acted upon in England for a considerable length of time. The law remained unaltered till the year 1819, when a bill was introduced into parliament by Lord Liverpool's government closely resembling the one passed in America in 1818. It was to some extent defended, especially [1] by Mr. Canning, on grounds somewhat similar to those just stated, but its immediate practical object was to prevent the enlistment of men, and the equipment of ships in England, in aid of the South American Spanish colonies, then in revolt against old Spain, and on this ground it was strenuously opposed by Sir James Mackintosh, Lord Brougham, and other liberal members of parliament.

Apart from the generalities of the subject, it was urged that the law as it stood was in a strange and objectionable position, inasmuch as the act of George II. made it a capital crime to engage in the service of the king of Spain, as he was within the words, "foreign prince, state, or potentate," whereas these words did not comprehend the revolted colonies. The answer to this was that the act of George II. should be repealed and the common law restored. The bill, however, [2] passed as 59 Geo. 3, c. 69. It forbad enlistment for foreign service, the fitting out of armed vessels for foreign service, and equipping or increasing the equipment of armed vessels for foreign service, and it extended not only to enlisting for the service of "foreign princes, states, and potentates," but also to enlisting for the service of any "colony, province,

[1] See his speech, June 10, 1819, Hansard, vol. xl. pp. 1102-1110.
[2] The second reading was carried by 248 to 174.

"or part of any province, or people, or for, or under, or in "aid of, any person or persons exercising, or assuming to "exercise, any powers of government over any such colony," &c. The act is extremely elaborate and verbose. It continued in force till the year 1870, and its effect was elaborately discussed in connection with the events of the American civil war.

During that contest there were built and equipped in English ports ships, especially the *Alabama*, which left our harbours and cruised against the ships of the United States, many of which were taken and destroyed. It was contended by the Americans, and denied by the English, that according to international law the English were bound to prevent what were described as breaches of neutrality, and it seems to me that the controversy supplied a good illustration of the worthless, inconclusive nature of such discussions. The real question was, whether the Americans thought the inconvenience of the English assistance to the Confederate States serious enough to go to war about; and whether the English thought the advantage of being able to build and sell such ships worth fighting for. To suppose that a great nation would submit to having its commerce ruined or would suppress an important branch of trade because Vattel had said something implying the one inference or the other appears to me to be absurd. The utmost that writers on international law can really do in such cases is to furnish decorous and plausible excuses for foregone conclusions. As for the Foreign Enlistment Act, it was obvious enough that it had nothing to do with the question between the two nations. The American complaint was equally well or ill founded whether the Foreign Enlistment Act did or did not enable the government to prevent British harbours from being turned into naval stations for the Confederates. If it did, their complaint was that it was not used. If it did not, their complaint was that it was ineffectual. If your fire burns my house it matters little whether you have a bad fire-engine, or having a good one neglect to use it. My complaint is that your fire burns my house. The efficiency of your fire engine is a matter not for me but for you.

CH. XXXI.

The discussion, however, produced one [1] decision which, whether right or wrong showed that the Foreign Enlistment Act of 1819 did not fulfil its object. A ship called the *Alexandra* was seized by the Customs authorities, which was, no doubt, built for the Confederate States, and intended to be used as a ship of war, but she was not fully equipped as a ship of war, nor was it in the opinion of the jury proved that she was intended to be so equipped in any English port. The court was divided in opinion as to whether an offence had been committed; but held in substance that an incomplete equipment was not an offence within the act.

This decision and the claims made by the United States against the British Government in respect of the damages done by the *Alabama* led to the repeal of the act of 1819, and the enactment of the Foreign Enlistment Act of 1870 (33 and 34 Vic. c. 90). This acts forbids, in very [2] elaborate language, all enlistments for the service of any foreign state, in terms closely resembling those of the act of 1819, but its provisions as to providing ships of war for foreign belligerents are much more stringent than those of the act of 1819. The act of 1870 forbids building, or causing to be built, any ship with intent or knowledge, or having reasonable cause to believe, that the same will be employed in the military or naval service of any foreign state at war with any friendly state. The act of 1819 forbade only equipping, furnishing, fitting out, and arming, or endeavours to do so; and this, as interpreted by R. *v.* Sillem, meant a complete equipment. Moreover, extensive powers to seize suspected ships were given under the act of 1870 (see sections 19—29), whereas the act of 1819 dealt with the subject slightly, and in a manner shown by experience to be inadequate (see s. 7, end).

[1] A.-G. *v.* Sillem, 2 H. & C. 431. The report and the notes to it contain a mass of authorities upon the whole subject of the Foreign Enlistment Act and of the mass of international law supposed to be connected with it.

[2] See my *Digest*, arts. 100-103, for its effect.

CHAPTER XXXII.

POLICE OFFENCES PUNISHABLE ON SUMMARY CONVICTION.

THE only offences which remain to be noticed are police offences punishable on summary conviction. I do not propose to go into any minute detail upon this subject. The number of offences punishable upon summary conviction has, of late years, been so very large, and the offences themselves are so numerous, and of such a varied character, that it would be practically impossible in such a work as this to give anything like a full account of them within any moderate compass. They form, however, far too characteristic and important a part of our whole legal system to be passed over in silence. Ch XXXII.

I have [1] already observed upon the summary jurisdiction exercised by magistrates over theft and many other crimes, especially when committed by the young, but this is a question of jurisdiction only, and not of definition.

A child who is tried for stealing, before a magistrate, is tried under the same definition of theft, and all the same doctrines are applicable to his offence, as if he were a man being tried at the assizes.

There are, however, a vast number of offences which are defined and created by the acts which give justices of the peace summary jurisdiction over them. Of these I will try to give some account.

Most of the offences over which the magistrates exercise a summary jurisdiction consist in the breach of regulations laid down by act of parliament, in order to prevent petty nuisances or to enforce the execution of administrative

[1] Vol. I. pp. 120-124.

CH. XXXII. measures of public importance. Of these I will briefly enumerate a few. Some of them relate to matters of the utmost importance and the deepest historical interest, but which have so very faint and slight a connection with the criminal law that it would be out of place to enter upon that history at length in a work like the present. The following short notices will explain my meaning.

EDUCATION.—The legislation which has provided a general system of education accessible to all, and to some extent compulsory upon all, is modern. It is all founded upon the Elementary Education Act of 1870 (33 & 34 Vic. c. 75). This act is made compulsory by [1] provisions which render parents liable to fines for not sending their children to school, and [2] which impose penalties on employers of labour who take children into their employment otherwise than upon the terms which the act allows.

There are also provisions in the Industrial Schools Act of 1866 (29 & 30 Vic. c. 118, ss. 14-19), which enable justices to send certain classes of children to schools which partake to some extent of the character of prisons.

The importance of these provisions, simple and short as they are, needs no remark. They form the sanctioning clauses of one of the most characteristic and most important sets of laws enacted in our days. As yet they cannot be said to have any history. The steps which led to the present state of the law has a history of the deepest interest, but this is not the place in which to relate it.

POLICE OFFENCES.—In the [3] first volume of this work I have given an account of the establishment of the police force throughout England. The acts which established it created a large number of petty offences, all of which are punishable on summary conviction, generally speaking by small fines, with the alternative, in some cases, of imprisonment.

These acts vary considerably in their provisions according to the places to which they apply. I will give a few illustrations, but they are only illustrations. The act 2 & 3 Vic. c 47 (August 17, 1839), which is one of the principal acts

[1] 33 & 34 Vic. c. 75, s. 74, and see 39 & 40 Vic. c. 79, ss. 11 and 12.
[2] 39 & 40 Vic. c. 79, s. 7.
[3] Vol. I. pp. 182-199.

relating to the Metropolitan Police contains a great number of provisions as to offences in the Metropolitan District and on the Thames which are punishable upon summary conviction. Thus sections 26-37 relate to offences upon the Thames, such as cutting ropes or other parts of the tackle of vessels, wilfully throwing things into the river to avoid seizure, breaking casks with intent to spill the contents, and many others. Sections 54-60 create a number of offences committed in the streets, such as discharging fire-arms, wantonly ringing bells, using profane or indecent language, and a great number of other things.

The 10 & 11 Vic. c. 89 (1847), contains a number of clauses which it was usual to insert in the improvement acts which from time to time are passed for towns and populous districts. They are here enacted in one body so that they can be and usually are embodied by reference in the special acts which are passed from time to time. [1]A large number of these sections create offences. One of them (s. 28) specifies thirty. They resemble those which are punished by the Metropolitan Police Act.

The Highway Act (5 & 6 Will. 4, c. 50) is full of penalties and summary offences, offences committed by surveyors, by collectors, by owners and drivers of carts, by persons using the highway or injuring it, or committing any sort of nuisance upon it.

Various general acts relating to railways, and the special act of every railway, create many offences by servants of the railway, by passengers, and by other persons. There are many other offences of the same sort, but for the purposes of illustration these are enough.

PUBLIC HEALTH AND SAFETY.—The summary offences against the Public Health Act are summarized in Oke's *Magisterial Synopsis* under the following heads :—Sewerage and drainage, privies, waterclosets, &c.; scavenging and cleaning, water supply; cellar dwellings and lodging houses; common lodging houses; houses let in lodgings; nuisances; offensive trades; unsound meat; infectious diseases and

[1] Ss. 21-31.

CH. XXXII. hospitals; highways and streets; and miscellaneous. The mere enumeration says all that need here be said.

The following are a few additional illustrations:—Offences under the explosive acts (38 Vic. c. 17); offences relating to gasworks (22 & 23 Vic. c. 66); offences relating to the adulteration of bread (6 & 7 Will. 4, c. 37), or of food and drugs (38 & 39 Vic. c. 63); and offences relating to water-works in towns (10 & 11 Vic. c. 17).

REVENUE OFFENCES.—Many of the administrative departments of State exercise their powers by means of penalties which can be imposed by justices. A good instance of this is to be found in the Customs Laws Consolidation Act, 1876 (39 & 40 Vic. c. 36), which is full of penalties for different revenue offences, all of which may be recovered before justices (42 & 43 Vic. c. 21, s. 11, 1879).

MISCELLANEOUS.—A great number of offences may be tried before justices which it is difficult to reduce under any general head. As instances I may mention fishery offences, cruelty to animals, unlawful gaming, offences by keepers of canal boats.

Probably all the acts which regulate particular trades or branches of business, such as the factory acts, the acts for the regulation of mines, the companies acts, and many others, create offences punishable on summary conviction.

I pass over these large subjects in a cursory and summary way because the offences in question do not form part of the criminal law properly so called, but are merely the sanctions by which other branches of the law are, in case of need, enforced.

Besides these offences, there are two sets of offences which are usually punished by courts of summary jurisdiction, each of which has a history of its own, and each of which may be regarded as a part of the criminal law. These are vagrancy and poaching.

VAGRANCY.—Vagrancy may be regarded to a great extent as forming the criminal aspect of the poor laws. I do not propose to enter upon the history of the poor laws in general, though it may be proper to remark here that the great mass of legislation which passes under that name is sanctioned at

every step by penalties enforceable before courts of summary jurisdiction. For instance, in the 43 Eliz. c. 2 (1601), the act which lies at the foundation of the whole system, penalties are imposed upon overseers who neglect to meet (s. 1) or refuse to account (s. 4), and on justices who make default in appointing overseers (s. 10), all of which may be levied and imposed by a warrant from two justices (s. 11). In the Poor Law Amendment Act of 1868 (31 & 32 Vic. c. 122, s. 37), parents neglecting their children in various ways are made liable to punishment on summary conviction, and I have little doubt that of the vast number of acts relating to the poor which have been passed from 1601 to our own time, all of any importance would be found to contain provisions of this kind.

I shall confine myself here to the offences known collectively as vagrancy.

I have already related in connection with offences relating to trade and labour the history of the Statute of Labourers. It was closely connected with the first appointment of justices of the peace, who were originally directed to hold Quarter Sessions in order to administer it. Shortly the leading points of that legislation and its connection with the poor law was this:—First came serfdom, next came the Statute of Labourers which practically confined the labouring population to stated places of abode, and required them to work at specified rates of wages. Wandering or vagrancy thus became a crime. A man must work where he happened to be, and must take the wages offered him on the spot, and if he went about, even to look for work, he became a vagrant and was regarded as a criminal. This, if they had been able to tell it, would, no doubt, have been the labourers' account of the matter. The statute book tells the story from the employers' point of view, and no doubt with a great deal of truth. [1] Statute after statute passed in the reign of Richard II. referring to the number of persons who wandered about the country and committed all sorts of crimes, leaving their masters, associating in bands and overawing the authorities.

1 Rich. 2, c. 6 (1377); 2 Rich. 2, c. 6 (1378); 7 Rich. 2, c. 5 (1383).

CH. XXXII. The last of the statutes referred to (7 Rich. 2, c. 5), says, "And "moreover it is ordained and assented to restrain the malice of "divers people, feitors and wandering from place to place, "running in the country more abundantly than they were "wont in times passed, that from henceforth the justices of "assizes in their sessions, the justices of peace, and the "sheriffs in every county, shall have power to inquire of all "such vagabonds and feitors and their offences, and upon "them to do all the law demandeth."

In 1388 an elaborate statute (12 Rich. 2) was passed containing many provisions as to labourers' wages and justices. It provided ([1] c. 3) that no servant should leave the hundred in which he dwelt without a letter patent from the king stating the cause of his going and the time of his return. There was to be a seal in every hundred for the purpose of giving these letters, and any one found wandering without such a letter was to be put in the stocks and kept till he found surety to return to his service. This was to be done by "the mayors, bailiffs and stewards of lords and constables "of towns." Besides which it is said that the artificers, labourers, and servants are to be "duly justified by the "justices of peace," whether at the sessions or in a summary way is not stated. Another chapter (7) forbids begging, and makes a distinction between beggars "able to labour," who are to be treated like those who leave the hundred, and "beggars impotent to serve," as to whom it is enacted that they "shall abide in the cities and towns where they be "dwelling at the time of the proclamation of this statute, "and if the people of cities or other towns will not or may "suffice to find them, that then the said beggars shall draw "them to other towns within the hundred, rape or wapentake, "or to the towns where they were born within forty days "after the proclamation made, and there shall continually "abide during their lives." What they are to do if the inhabitants of those towns "will not or may not suffice to "find them" does not appear. This act, however, is the first which recognises the impotent poor as a class distinct from

[1] Many of the chapters into which the statute is divided correspond to the sections of a modern act.

the able-bodied poor, and may thus be regarded as in some sense the origin of the later poor law. Chapter 10 of the statute provides that "in every commission of the peace "there shall be assigned but six justices with the justices of "assizes." They are to inquire diligently whether the mayors, bailiffs, stewards and constables have duly done execution of the ordinances of servants and labourers.

Some analogous statutes were passed in the reign of Henry IV. which I pass over, but in the reign of Henry V. was passed a remarkable act, 2 Hen. 5, c. 4 (A.D. 1414). It recites that "the servants and labourers of the shires of the realm do flee "from county to county because they would not be justified by "the ordinances and statutes by the law for them made, to the "great damage of gentlemen and others to whom they should "serve because that the said ordinances and statutes for them "ordained be not executed in every shire." It then empowers the justices of the peace to "send their writs for such "fugitive labourers to every sheriff in the realm of England," who are to take them and send them back to the place whence they came. The act concludes by enacting that the "justices of the peace from henceforth have power to "examine, as well all manner of labourers, servants, and their "masters, as artificers, by their oaths, of all things by them "done contrary to their said ordinances and statutes, and 'upon that to punish them upon their confession after the "effect of the ordinances and statutes aforesaid as though "they were convicted by inquest." The statute thus gave the justices summary jurisdiction over all offences by labourers and artificers. It is possible that the predominance of the clergy in Henry V.'s reign may have had something to do with the establishment of a mode of procedure which has a good deal of resemblance to the *ex officio* oath of the ecclesiastical courts.

Some [1] acts were passed in Henry VII.'s time, which authorised constables and others to put vagrants into the stocks instead of committing them to gaol; but the next act of much importance on this subject was passed in 1530: it was

[1] 11 Hen. 7, c. 2 (1494); 19 Hen. 7, c. 12 (1503).

CH. XXXII. [1] 22 Hen. 8, c. 12, and imposed most severe penalties on vagrants. The impotent poor were to be licensed by the magistrates to beg within certain local limits. Out of those limits begging was to be punishable by two days and nights in the stocks with bread and water. Begging without a letter was to be punished by whipping. Vagrants "whole and "mighty in body, and able to labour" were to be brought before a justice, high constable, mayor, or sheriff, "who at "their discretion shall cause every such idle person to be had "to the next market town, or other place most convenient, "and to be there tied to the end of a cart naked, and be "beaten with whips throughout the same town or other place "till his body be bloody by reason of such whipping." After this he was to be sent back to labour, being liable to more whipping if he did not go straight home. "Scholars of the "universities of Oxford and Cambridge, that go about begging, "not being authorised under the seal of their universities," were to be treated as "strong beggars." "Proctors and par-"doners going about without sufficient authority," people pretending to knowledge in "palmistry or other crafty "science," and some others of the same sort, were to be even more severely handled. For the first offence they were to be whipped for two days together, for the second offence "to be "scourged two days, and the third day to be put upon the "pillory from 9 till 11 A.M.," and to have an ear cut off. For the third offence the same penalty—the other ear being cut off. This act had defects which are thus described in the preamble of an act to amend it, passed five years afterwards (27 Hen. 8, c. 25, A.D. 1535-6). "It was not provided in the afore-"said act how and in what wise the said poor people and "sturdy vagabonds should be ordered at their coming into "their counties, nor how the inhabitants of every hundred "should be charged for the relief of the same poor people, "nor yet for setting and keeping in work and labour the "aforesaid valiant vagabonds." The act goes on to say that the valiant beggars and sturdy vagabonds are to be set to

[1] This act is abstracted in Nicholas's *History of the Poor Law*, i. pp. 119-124. It is not printed in Pickering and the other common editions of the Statutes, but is to be seen in the *Statutes of the Realm*.

work, and the poor people to be "succoured, relieved, and "kept," and that the churchwardens and two other persons of every parish are to collect alms for the purpose of providing expenses. This act refers to a new description of vagabonds, namely, "ruttelers," calling themselves serving men, but having no masters. They, when taken, are to be whipped, and "to have the upper part of the gristle of the right ear "cut clean off, so as it may appear for a perpetual token that "he hath been a contemner of the good order of the common-"wealth." If any person so marked offends again in the same way he is to be committed to the quarter sessions, and upon conviction to be hanged.

In 1547 all these statutes were repealed by 1 Edw. 6, c. 2, as not being sufficiently severe. This act provides that every loitering and idle wanderer who will not work, or runs away from his work, is to be taken for a vagabond, branded with a V, and adjudged a slave for two years to any person who demands him; to be fed on bread and water and refuse meat, and caused to work in such labour "how vile "soever it be as he shall be put unto by beating, chaining, "or otherwise." If he runs away he is to be branded in the cheek with the letter S, and adjudged a slave for life, and if he runs away again he is to be hanged. If no one will take the vagabond, and if he has been a vagabond three days, any justice of the peace may "cause the letter V to be marked "on his or her breast with a hot iron," and send him to the place where he was born, there to be compelled to labour in chains or otherwise on the highways or at common work or from man to man as the slave of the inhabitants, who are to keep him to work under penalties. If the vagabond misrepresents the place of his birth he is to be branded in the face, and remain a slave for life.

This act lasted only two years, for in 1549 it was repealed by 3 & 4 Edw. 6, c. 16, and the acts of Henry VIII. were revived. In 1552, by 5 & 6 Edw. 6, c. 2, these statutes were confirmed, but licenses to beg upon certain terms were permitted to be given.

In 1555, by 2 & 3 Phil. & Mary, c. 5, provision was made for weekly collections for the poor, and provisions as to the

CH. XXXII. quantity of licenses to beg were enacted, which were in substance the same as those of the act of 1552, though rather more detailed. In 1572 all these statutes were repealed by 14 Eliz. c. 5, which provided that all beggars should be "grievously "whipped and burnt through the gristle of the right ear," for a first offence, and be guilty of felony for the second.

This act, with all the others then in force against rogues and vagabonds, was repealed in 1597 by 39 Eliz. c. 4, which remained in force with some alterations for more than a century. It provided that the justices of counties should have power to erect houses of correction for the reception of rogues and vagabonds and sturdy beggars till they are either put to work or banished to such places as may be assigned by the privy council. Any such persons found begging, wandering, or misordering themselves shall, by the appointment of any justice, constable, headborough, or tithing man, "be "stripped naked from the middle upwards, and be openly "whipped until his or her body be bloody," and be then sent to their birthplace or place of residence by a fixed route, being whipped upon every deviation from it. They are thence to be taken to the house of correction, there to be kept till they are employed or banished. The act defines rogues and vagabonds as "all persons calling themselves "scholars going about begging, all seafaring men pretending "losses of their ships and goods on the sea; all idle persons "going about either begging or using any subtle craft, or "unlawful games and plays, or feigning to have knowledge "in physiognomy, palmistry, or other like crafty science, or "pretending that they can tell destinies, fortunes, or such "other fantastical imaginations; all fencers, bearwards, "common players, and minstrels; all jugglers, tinkers, and "petty chapmen, all wandering persons and common la-"bourers, able in body and refusing to work for the wages "commonly given; all persons delivered out of gaols that "beg for their fees or travel begging; all persons that wander "abroad begging, pretending losses by fire or otherwise, and "all persons pretending themselves to be Egyptians."

This statute was slightly amended by 1 Jas. 1, c. 7 (A.D. 1604) which added to the other penalties mentioned in the

act that such rogues "as shall by the said justices be ad-"judged incorrigible or dangerous shall be branded in the left "shoulder with a hot burning iron of the breadth of a "shilling with a great Roman R upon the flesh." Thus amended, the law received no further alteration till the year 1713, when the 12 Anne, st. 2, c. 23, repealed all laws as to rogues and vagabonds, but re-enacted the act of 1597 with a few omissions and alterations which relate rather to the parish by which the rogue or vagabond is to be maintained than to his treatment. This act authorized the justices to commit incorrigible rogues to the custody of any persons who would receive them as servants or apprentices (practically as slaves), and set them to work either in Great Britain or in any colony for seven years.

In 1737 this act was explained by 10 Geo. 2, c. 28, to extend to persons acting plays in any place (out of Westminster) where they had not a legal settlement, or were not licensed by the Lord Chamberlain. These acts were repealed and re-enacted by 13 Geo. 2, c. 24, passed in 1740, which continued in force for four years only. In 1744 a new and most comprehensive act was passed (17 Geo. 2, c. 5) which gave the law much of the form which it has since that time retained. It distinguished offenders into three classes, namely, (1) idle and disorderly persons, (2) rogues and vagabonds, and (3) incorrigible rogues, and regulated in minute detail all proceedings to be taken for their arrest, return to their place of settlement, and punishment. The most noticeable additions made by the act to the law as it stood under the act of Anne was the inclusion under its penalties of persons running away from their wives and children. This act was amended in 1792 by 32 Geo. 3, c. 45. It was [1] repealed by 3 Geo. 4, c. 40 (1822), which was intended to consolidate the law upon the subject. This act, however, lasted for two years only, having been repealed by 5 Geo. 4, c. 83 (1824), which is now in force. This act greatly extends the definition of a rogue and vagabond, including under it many offences against public decency, and many acts characteristic of criminals

[1] The repeal is only by general words. By the Statute Law Revision Act (1867), 30 & 31 Vic. c. 59, the act is expressly repealed, except s. 32.

CH. XXXII. though not actually criminal, as, *e.g.*, being armed with intent to commit felony, being found in dwelling-houses, yards, &c. for any unlawful purpose, reputed thieves frequenting rivers, canals, streets, with intent to commit felony, and many others. These provisions have been so much extended by more recent legislation, that it may now be almost stated as a general proposition, that any person of bad character who prowls about, apparently for an unlawful pupose, is liable to be treated as a rogue and vagabond. I omit the details because they are given in my [1] *Digest*.

In order to appreciate fully the importance and significance of the law as to vagrancy it is necessary to bear in mind the law as to the relief and settlement of the poor of which it is to some extent the complement. To attempt to relate that history in anything approaching to detail would be impossible, but in shortly summing up the history of the law of vagrancy I will shortly notice the corresponding stages in the history of the poor law.

In the times when serfdom was breaking down, and when the statutes of labourers provided what might be regarded as a kind of substitute for it, provisions as to vagrancy were practically punishments for desertion. The labourer's wages were fixed; his place of residence was fixed; he must work where he happened to be. If he went elsewhere he must be taken and sent back. By degrees the order of ideas which this view of the subject represented died away. The vagrant came to be regarded rather as a probable criminal than as a runaway slave. He must be made to work or else be treated as a criminal. If he cannot work he may have a licence to beg. Social and economical causes of various kinds increase the number of vagrants, and the law becomes so severe that for a short time vagrants are condemned to slavery, branding, and death. As time goes on it becomes obvious that mere punishment on the one hand, and mere voluntary charity on the other, will not meet the evil admitted to exist. An elaborate system of poor law relief is founded by the famous act of 1601, and in anticipation of it the act of 1597 treats the offence of vagrancy no doubt with what we should regard

[1] Chapter xx. arts. 192-195.

as extreme severity, but still with less severity than had been formerly applied to it. Through the seventeenth century little change was made in the law; but in the eighteenth century the whole system of poor law relief was elaborated, and the law of vagrancy was recast so as to punish those persons only who really preferred idleness to parish relief. This process was nearly completed by the Act of 1824 which is now in force. The new Poor Law of 1834 and the acts subsequent to it have not altered the law of vagrancy, though it has been made more searching and stringent as the efforts to suppress crime by a vigorous system of police have increased in energy and stringency.

OFFENCES RELATING TO GAME.

The law as to offences relating to game has attracted so much attention and fills so large a space in political discussion, that some account of its history may be interesting.

It is commonly supposed to reach back to and to be derived from the forest laws, but I am by no means satisfied that this is correct, though [1] Blackstone goes so far as to call the game laws "a bastard slip" from the forest laws.

Under the Norman kings, a man might not even in his own land, and out of the king's forest, kill beasts or birds of chase or warren, unless he had from the king a grant of chase or free warren, but what was to happen if he did so does not appear. Probably he might be liable to fine. The principal provisions of the forest laws, however, applied to the forests themselves, and of them and of the courts by which they were put in force I have already spoken. Well known passages in the chronicles preserve the recollection of the cruelties of William the Conqueror and Henry I. against those who killed their deer. The earliest actual law on the subject which remains is the [2] Assize of Woodstock in 1184.

[1] 4 Blackstone, *Com.* p. 409. "From this root has sprung a bastard slip, "known by the name of the Game Law, now arrived to and wantoning in its "highest vigour." This is one of the few cases in which Blackstone expresses contempt of any part of the law. There is probably in his contempt a good deal of the damning of sins we have no mind to.

[2] Stubbs, *Const. Hist.* i. p. 403. See for the assize itself, Stubbs's *Charters*, pp. 156-159.

The parts of it which bear on the subject of the punishment of offences are the first and last sections.

In the first, the king "defendit quod nullus ei foris faciat de "venatione suâ nec de forestis suis in ulla re." Transgressors are not to expect to be dealt with, as he had been in the habit of dealing with them, by fine. If any one transgresses in future, "plenariam vult de illo habere justitiam qualis fuit facta "tempore regis Henrici avi sui." This reads like a threat not intended to be carried into execution, for the last section (16) says expressly, "Item rex præcipit quod nullus de cætero "chaceat ullo modo ad capiendas feras per noctem infra "forestam nec extra ubicunque feræ suæ frequentant, vel "pacem habent aut habere consueverunt sub pœnâ impri-"sonamenti unius anni, et faciendo finem et redemtionem ad "voluntatem suam." By the [1] charter of the forest it is enacted that "no man from henceforth shall lose either life or "member for killing of our deer." The punishment is to be "a grievous fine if he have anything whereof;" if not, a year's imprisonment.

In 1275, it was provided by 3 Edw. 1, c. 20 (the Statute of Westminster the First), that any one trespassing in parks or ponds should pay heavy damages to the party and be imprisoned for three years, and pay fine and give security, or if he cannot find security abjure the realm. This statute remained nominally in force till 1827, when it was repealed by 7 & 8 Geo. 4, c. 27.

In giving the history of the law of theft, I have referred to several cases in the Year-books, which show that in the fifteenth century the theory prevailed that the owner of land had a modified transient property in the wild animals which were upon it for the time being, and that he might sue those who infringed his rights; though the property was not, according to Coke, such that the takers of the animals were guilty of larceny. This may not be absolutely inconsistent with what is considered by Blackstone to have been the principle of the forest laws, but the two are, to say the least, very unlike each other, and the courts would hardly have laid down the doctrine

[1] 9 Hen. 3, c. 10. It was originally of even date with Magna Charta.

of the property of the owner of the land in the wild animals, unless the old theory as to the universal right of the king had been in practice at least obsolete.

This makes it probable that the earliest game laws were not a "bastard slip" from the forest laws, but rather the result of a new order of ideas. The first act upon the subject (13 Rich. 2, c. 13, A.D. 1389) was in fact passed at the time when the rising of the commons had been put down, and when the vagrancy laws already referred to were beginning to be enacted. Its preamble is remarkable. It recites that "divers artificers, labourers, and servants, and persons keep "greyhounds and other dogs, *and on the holy days, when good "Christian people be at church hearing divine service*, they go "hunting in parks, warrens, and connigries, of lords and "others, to the great destruction of the same, and sometimes "under such colour they make their assemblies, conferences, "and conspiracies, for to rise and disobey their allegiance." It then enacts that no one who has not land to the value of 40*s.* a year shall keep a greyhound or dog to hunt, or use ferrets, nets, &c., to take or destroy deer, hares, or conies, "nor other gentleman's game," under pain of a year's imprisonment. It is curious to observe how at his first appearance on the English statute-book the poacher is conceived of as a low person, a radical, and more or less of a dissenter. Between 1389 and 1832, or 443 years, about twenty acts were passed relating to game; and these collectively constituted the game laws when the present statute, 1 & 2 Will. 4, c. 32, which replaced all but one of them, was passed into law. It would be tedious to give an account of all of them, but I will describe their general character.

In the first place, it is to be observed that though several of the acts were obviously meant to be what we should now call consolidation acts, and as such to supersede their predecessors, none of the old acts were ever repealed. On the contrary, they were referred to, re-enacted, and directed to be put in force, subject only to the proviso that a person should not be punished under more than one act for any one offence. The 13 Rich. 2, just referred to, was in force theoretically till 1832.

CH. XXXII.

In the second place, the objects aimed at by the acts are quite distinct from each other. Some of them are obviously intended in good faith only or mainly to preserve the game itself from waste or destruction. Such, for instance, are 14 & 15 Hen. 8, c. 10 (1522), to prevent the tracking of hares in the snow, and 25 Hen. 8, c. 11 (1533), "to "avoid destroying of wild fowl;" but most of them form a system by which the amusement of sporting was made the monopoly of a small class of persons possessed of a high property qualification. This idea is to be traced in the original act of Richard II., but it becomes by degrees fully developed. I wili mention the principal statutes on the subject. The first is 11 Hen. 7, c. 17 (1494), which recites that many persons having little substance to live upon take and destroy pheasants and partridges upon the lands of "owners and possessioners," whereby such owners and possessioners "leese not only their pleasure and "disport,". . . "but also they leese the profit and avail that "by that occasion should grow to their household." The statute then enacts that any person who takes any pheasants or partridges upon the freehold of any other person without the license of the owner or possessioner shall be liable to a penalty of £10, half to the informer and half to the owner or possessioner. This penalty, when we have regard to the value of money, seems monstrous. It would be equivalent perhaps to a penalty of £150 to £200 in our own time, and it must have exposed any small yeoman who killed a partridge off his own ground to utter ruin at the suit of any informer. This statute remained in force nominally till 1832, but was probably not enforced, for eighty-seven years after it passed it was recited by 23 Eliz. c. 10 (1581) that the game of "pheasants and partridges is within these few years in "manner utterly decayed and destroyed in all parts of "this realm, by means of such as take them with nets, "snares, and other engines and devices, as well by day as by "night, and also by occasion of such as do use hawking in "the beginning of harvest, before the young pheasants and "partridges be of any bigness." It then imposes a forfeiture of twenty shillings for every pheasant and ten shillings for

every partridge taken in the night-time, and of forty shillings for hawking in the standing corn, the fines to be recovered before a justice of the peace, and to go half to the lord of the manor and half to the informer. These penalties are heavy enough, but are so much lighter than those of the earlier statute that the latter must have been forgotten. It applies only to night poaching.

In 1604 was passed 1 Jas. 1, c. 27, which recited, amongst other things, that the earlier acts had failed because the poachers were usually too poor to pay the penalties or costs, and it accordingly enacted that every one who shot or shot at "any pheasant, partridge, house-dove or pigeon, hearn, "mallard, duck, teal, widgeon, grouse, heathercock, moregame, "or any such fowl, or any hare," was to be imprisoned for three months unless he paid twenty shillings for every bird or hare so killed. The terms of the section are absolute, and forbid all shooting "with any gun, cross-bow, stone-bow, or "long-bow," at any of the birds mentioned, and at hares.

It permits coursing to certain persons qualified by estate or birth, and the netting of pheasants and partridges to a [1] rather more restricted class. It also forbids the selling and the buying to sell again of deer, hares, partridges, and pheasants.

In 1609 the property qualification was greatly raised, and the right conferred by it was altered from a right to net pheasants and partridges on the land of the qualified person to a right to take pheasants and partridges on their own land in the day-time, "between the feast of St. Michael the "Archangel and the birth of our Lord God, yearly." This was effected by 7 Jas. 1, c. 11. It also forbade hawking for pheasants and partridges between the 1st of July and the 31st of August. I suppose "take" in the act of 1609 was construed to include "shoot," otherwise the shooting of partridges and pheasants continued to be unlawful, and to subject all sportsmen to a fine of twenty shillings for each bird or hare down to 1832. The act of 1604 seems to proceed on

[1] "The son or sons of any knight, or of any baron of parliament, or of "some person of higher degree, or the son and heir apparent of any esquire," might keep greyhounds for coursing, and nets for partridges and pheasants, but might not, apparently, net partridges or pheasants, unless they possessed certain other qualifications. Cf. ss. 3 and 6.

CH. XXXII. the principle that the only proper and sportsmanlike way of killing game was by hawking or coursing, that shooting was to be altogether illegal, and netting permitted only to qualified owners. The act of 1609 abolishes netting and restricts hawking.

In 1670 (22 & 23 Chas. 2, c. 25) the appointment of gamekeepers was first authorized, and all persons with less than £100 a year freehold, £150 leasehold for 99 years, except the heir apparent of a squire and others of higher degree, were forbidden to have guns, bows, or sporting dogs, and gamekeepers were authorized to search houses for them. Killing rabbits by night was made punishable by ten shillings fine. By 5 Anne, c. 14, A.D. 1706 (see, too, 28 Geo. 2, c. 12), the sale of game was put under further restrictions, and by [1] other statutes various regulations were made as to the season for different kinds of game, and [2] others made provisions as to the manner in which penalties were to be sued for, but no act of sufficient interest to be here noticed was passed till 9 Geo. 4, c. 69 (1828), which is still in force. There were, however, provisions as to deer-stealing and killing rabbits and hares in warrens to which I have [3] already referred.

The act of George IV. is still in force. It is far severer than any of its predecessors, except one or two which were practically obsolete. It is the first act which punished poaching as a crime, instead of treating it as an offence of which a money penalty was the primary and natural consequence. It punishes taking or destroying game or rabbits by night, or being unlawfully on any land by night for the purpose of so doing, for the first offence with imprisonment and hard labour up to three months; for the second offence up to six months; and for the third offence with transportation for seven years, or imprisonment and hard labour up to two years. Owners or their keepers may arrest offenders, and if the offender offers resistance with any offensive weapon, he may be punished, whether it is his first, second, or third offence, with seven years' transportation as a maximum. If three persons, of whom any one is openly armed, are on

[1] 2 Geo. 3, c. 29; 39 Geo. 3, c. 34; 43 Geo. 3, c. 112.

[2] 8 Geo. 1, c. 19; 26 Geo. 2, c. 27.

[3] *Ante*, p. 148.

land by night in order to destroy game or rabbits, each of them is liable to fourteen years' transportation as a maximum punishment.

All the acts to which I have referred, except only the act of 1828, were repealed in 1832 by 1 & 2 Will. 4, c. 32. It established the present system, by which qualifications for sporting and the prohibition of the sale of game were abolished, and new penalties for poaching by day were substituted for the old ones. Those penalties are [1] as follows:—

For a trespass in pursuit of game by day, a fine of £2 and costs; if the poachers are to the number of five or more, £5 and costs; trespassers may be required to give their names and addresses and to leave the land, and if they refuse may be arrested. If they endeavour by violence or intimidation to prevent any authorized person from approaching them, or refuse to give their names, they are liable to a fine of £5.

Some slight alterations and amendments in the law have been made of late years, but I need not refer to them specifically. The general effect of the history I have related is as follows:—A series of statutes extending over 317 years (13 Rich. 2, 1389, to 5 Anne, 1706) erected the right to kill game into the privilege of a class at once artificial and ill defined. The game itself became incapable of being sold. The result of this was that, on the land of an unqualified freeholder, partridges, pheasants, and hares were in an extraordinary position. The owner could not kill them because he was not qualified, and if any one else did so without the owner's leave he committed a trespass. As I have shown, it was theoretically doubtful whether from 1604 to 1832 any one could lawfully shoot a pheasant, partridge, or hare whatever qualification he possessed. The penalties by which this privilege was protected were not (except in the case of deer-stealers) severe, consisting principally in a moderate money fine, which might, in default of payment, be converted into imprisonment. This system lasted for something over 120 years (1706—1828), when it was sanctioned by an act (9 Geo. 4, c. 69) which turned night poaching into a

[1] 1 & 2 Will. 4, c. 32, ss. 30-32.

CH. XXXII. serious crime, punishable on a third conviction with transportation. Four years after this the old system was swept away, and a new one was substituted for it, by which the right to game became an incident of the ownership or right to possession (as might be arranged between the owner and occupier) of land, and game itself was allowed to be sold like any other produce of the soil, subject to a few restrictions of no interest. Lastly, the severe penalties which had formed the crowning point of the old privilege became the sanction of the new incident of property.

Upon a full review of the whole subject, it seems to me that the act of George IV. is needlessly severe. No doubt it ought to be a serious offence severely punishable to form part of an armed gang of night poachers, because, as a fact, the offence leads to desperate acts of violence. For many years, when I was on the Midland Circuit, every or almost every Spring Assize produced cases in which life had been lost, or desperate injuries inflicted, in fights so occasioned; but I think that the liability to penal servitude might be made to depend on the conduct of the poachers when challenged to surrender. If they did so quietly, or even if they ran away quietly, they ought not to be liable to any specially severe punishment. I think too that to make a man liable to seven years' penal servitude on a third conviction for mere night poaching is cruelly severe, nor do I understand why an assault with a stick on a keeper in order to resist apprehension is made punishable by seven years' penal servitude, when an assault on a police constable in the execution of his duty is punishable only by two years' imprisonment and hard labour. If the keeper is unlawfully wounded, or if grievous bodily harm is inflicted on him with intent to avoid a lawful apprehension, the offence can be dealt with under the general provisions of the law.

A considerable number of acts have been passed in very recent times for the protection of salmon and other fish, of sea-fowl and other birds; but they are of no legal or historical interest.

CHAPTER XXXIII.

INDIAN CRIMINAL LAW.

In the first chapter of this book I said that the criminal law of England resembled that of Rome in the circumstance that it had been adopted in many countries other than that of its origin. To omit all notice of these systems would be to give an inadequate idea of the interest and extent of the subject. To give anything like an adequate outline of them would not only require knowledge which I do not possess, but would swell this work to an unmanageable size. CH. XXXIII.

The criminal law of England has been reproduced in various shapes in nearly all the thirty-eight States which form the United States of America. It has also been introduced into most of the [1] forty-five colonies which form part of the British Empire. There are thus seventy or eighty versions of the English criminal law. In some cases the law has been codified. In others it remains as it was at the time of its introduction, subject to such modifications as it has received by local legislation.

A favourable instance of the way in which the criminal law of England is reproduced in the colonies is supplied by the act which in the colony of Victoria serves the purposes of a Penal Code. This is "The Criminal Law and Practice "Statute of 1864," [2] which came into force January 1, 1865. It re-enacts, with almost servile minuteness, the Consolidation Acts of 1861. It contains no definition of murder, theft, or

[1] Counting the eight colonies which make up the Dominion of Canada as one.

[2] 27 Vic. No. 233.

CH. XXXIII. other common law offences, but assumes that the common law definitions are in force. It retains all the clumsy enactments to which I have referred in detail as to attempts to murder. It also retains (which is singular) the provisions of the Larceny Act as to deer stealing, and the minute and technical distinctions of the same act as to housebreaking and burglary. The most noticeable difference between the English and Australian law lies in the number of cases in which the latter has retained the punishment of death, which may still be inflicted for attempts to murder, for rape, and for some other offences. In all such cases the court may order sentence of death to be recorded. It would be difficult to give a better instance of the way in which a known, fixed system of law has a tendency to reproduce itself, with all its imperfections, simply because it is known and fixed. Enactments of a similar kind, more or less skilfully framed, are in force in many other colonies.

Far superior in interest to any of these versions of the English criminal law is the system of criminal law established in British India. Happening to have a special acquaintance with it, I will give some account of its history and its contents. It consists substantially of two acts—the Indian Penal Code (Act XLV. of 1860), and the Indian Code of Criminal Procedure (Act X. of 1882), which is to come into force January 1, 1883. There are some few provisions of minor importance, but these two acts may be said to constitute the criminal law of British India, and as such they constitute one of the most important bodies of law in the world, applying as they do to a population of nearly 200,000,000 persons of many different races and languages, and regulating the most important part of the proceedings of the officers by whom they are governed.

It would require a separate work to give a full account of the different events which led to the introduction and gradual establishment of these two memorable enactments, or to give an adequate idea of their contents. I will, however, give a short sketch of both.

The laws now in force in British India sprang from many distinct roots, and were enacted upon different occasions, by

bodies possessing very different degrees of legislative power. I will first sketch the history of the criminal law of Bengal.

The criminal law of Bengal in force when the English power first rose was that version of the Mohammedan criminal law which was taught by the leading doctors of the Sooni Mohammedans—Aboo Huneefah, and his two disciples, Aboo Yoosuf and Imam Mohammed. It was introduced into India by the Mogul conquerors, whose power culminated in the latter half of the 16th century under [1] Akbar. The administration of the system was, when the English power was first established, a matter of much greater importance than the system itself, and was organized as follows.

On the 12th of August, 1765, Clive obtained from the Emperor of Delhi, whose power was fast falling into decrepitude, a grant of the diwani of Bengal, Bahar, and Orissa, which gave the Company power to collect the revenues of those provinces, and thus, according to the views there prevalent, invested them with powers not substantially distinguishable from those of sovereigns.

For a considerable period they were extremely reluctant to assume ostensibly the authority which they really possessed, finding it far more convenient for their purposes to leave the superintendence of all the business of government and the administration of justice as much as possible in the hands of the natives whom they found in the exercise of it.

The native system for the administration of justice, if such it deserved to be called, was as follows. The head of the system was the Nawab Nazim, whom the Company kept up as nominal subadar or governor under the nominal Emperor of Delhi. His capital was Moorshedabad, where there were three criminal courts, whose functions are thus [2] shortly described. "The Nazim, as supreme magistrate, presides personally in the trial of capital offenders; the deputy of the "Nazim takes cognizance of quarrels, frays, and abusive "names; the Foujdar is the officer of police, the judge of "all crimes not capital—the reports of these last are taken "before him, and reported to the Nazim for his judgment

[1] His reign extended from 1556-1605, almost exactly coinciding with that of Queen Elizabeth.

[2] Beaufort, i. p. 4, quoting from the report of the Committee of Circuit.

CH. XXXIII. "and sentence upon them; the Mohtesib has cognizance of "drunkenness, and of the vending of spirituous liquors and "intoxicating drugs, and the examination of false weights "and measures; and the Cotwal is the peace-officer of the "night, dependent on the Foujdaree."

These were the courts of the capital, but in the rest of the country the whole administration of justice both civil and criminal was in the hands of the zemindars. [1] "The Zemin-"dar, who was formerly the great fiscal officer of a district, "commonly exercised both civil and criminal jurisdiction "within the territory over which he was appointed to pre-"side. In his Foujdary, or criminal court, he inflicted all "sorts of penalties—chiefly fines for his own benefit; even "capital punishments, under no further restraint than that "of reporting the case at Moorshedabad before execution." . . . . . "His discretion was guided or restrained by no "law, except the Koran, its commentaries, and the customs "of the country, all in the highest degree loose and indeter-"minate. Though there was no fixed and regular course of "appeal from the zemindary decisions, the government in-"terfered in an arbitrary manner as often as complaints were "preferred to which, from their own importance or from the "importance of those who advanced them, it conceived it "proper to attend."

Great efforts were made for a length of time to reform these institutions without taking them out of the hands of the native officials by whom they were managed. For this purpose [2] a variety of experiments were tried. In 1769, European supervisors were appointed. In 1770, two councils were established, one at Moorshedabad and another at Patna, with authority over the supervisors. In 1772, new courts were set up. In each district there was a Foujdaree Adaulut, or criminal court, composed of Mohammedan officers. In each was a [3] Kazi, and a Mufti, and two mulvis, who tried all criminal cases, in the presence however of a collector, being a servant of the Company, whose duty it was to see that the trial was fairly conducted according to the law by

[1] Mill's *India*, iii. p. 467. [2] Beaufort, i. p. 4.
[3] The "Cadi" of the *Arabian Nights*.

which it professed to be guided. A superior court was established at Moorshedabad, called the Nizamut Sudder Adaulut (chief criminal court), the officers of which were natives, namely, a Daroga, the chief Kazi, the chief Mufti, and three mulvis. They formed a court of revision as to the proceedings of the Foujdaree Adaulut, and in capital cases signified their approval or disapproval of convictions and prepared the sentence for the warrant of the Nazim.

These courts were for many reasons altogether inefficient. For one thing there was almost no police. [1] In 1774, Warren Hastings attempted to supply that defect by reviving old native institutions which had fallen into decay, but experience proved that they would not work, and they were accordingly abolished in 1781, when the English judges of the civil courts "were invested with the power as magistrates of "apprehending dacoits" (gang robbers) "and persons charged "with the commission of any crimes or acts of violence." They were not however to try their prisoners, but were to send them to the daroga, or head judge, of the nearest foujdaree court for trial. These officers were supine and indifferent, and when they received prisoners frequently detained them in prison for an unreasonable time and subjected them to great cruelties. Various attempts were made to reform these evils, but they all failed. [2] It was at that time regarded as a first principle, that the administration of criminal justice should be left in the hands of the Mohammedan officers, "who were not to be interfered with, beyond "what the influence of the British Government might effect "through occasional recommendations of forbearance to inflict any punishment of a cruel nature."

This policy proved altogether abortive, and at last an entirely different one was adopted, which was carried into effect by [3] regulations first passed in 1790, and afterwards in a more permanent and extended form in 1793. These were the regulations famous as Lord Cornwallis's Judicial Regulations. They formed the foundation of the existing system, though they were brought into that condition by a long

[1] Beaufort, i. p. 6.

[2] Beaufort, i. p. 9, quotes a passage from the Instructions of the Directors to Lord Cornwallis to this effect.

[3] Beaufort, i. p. 11.

CH. XXXIII. series of changes in detail which need not be here described. [1] The system was at first as follows :—

In each district or zillah was a European judge with an establishment, of which native officers qualified to expound. Hindoo or Mohammedan law were important members.

There were in Bengal four Courts of Appeal—one at Calcutta, one at Patna, one at Dacca, and one at Moorshedabad. Each court consisted of three judges and three native expounders of the law, a Kazi, a Mufti, and a Pundit. These courts were all subject to a court at Calcutta called the Sudder Diwani Adaulut, or Supreme Civil Court, which consisted of the Governor-General and his Council, with the principal native law officers.

The judges of the four Courts of Appeal went circuit for criminal business twice a year to every zillah in their provinces, besides holding sittings at the cities in which they sat.

The substance of the procedure before the circuit courts was as follows. The judge tried the case, much as an English judge without a jury might try it, a written record being made of every part of the trial and especially of the evidence. The Kazi or Mufti, who was always present at the trial, wrote at the bottom of the record the sentence required by the Moslem law. If the judge agreed, judgment was given accordingly. If not, the matter was referred to the Nizamut Adaulut or Supreme Criminal Court, which consisted of the same persons as the Diwani Adaulut, or Supreme Civil Court. Capital cases were also referred for approval to the Nizamut Adaulut.

These were the first courts presided over by English judges established under the authority of the Company for the adminstration of civil and criminal justice to the natives of India. As the British territory has increased, and as our views of the extent to which legislation ought to be carried have extended, great modifications have been gradually introduced into the scheme devised by Lord Cornwallis, but its essential features can still be traced.

The district or zillah is still the unit of administration and of judicial organization, but the establishment of a

[1] Mill's *India*, v. pp. 422-432.

district in the present day is very different from what it was in Lord Cornwallis's time, and the other parts of the system both judicial and executive differ still more widely. It would be a laborious and not very interesting task to trace out in detail the different steps by which the present system was established. It will be sufficient to say that whilst the East India Company still existed it was modified to the following extent. The constitution of the Nizamut Adaulut was completely changed. Instead of consisting of the Governor-General in Council, it was composed of civilian judges, who sat at Calcutta, though outside the Presidency limits. They constituted two Courts of Appeal, the Sudder Diwani Adaulut, or supreme civil court, and the Sudder Nizamut Adaulut, or supreme criminal court. CH. XXXIII.

The provincial circuit courts were also abolished. The districts were arranged in groups called divisions, each under a commissioner who in practice had little to do with the administration of justice, though I believe he was *ex officio* a sessions judge, which might be a relic of the authority of the old provincial circuit courts; but the powers of those bodies as criminal courts were transferred to the district or zillah judges, whose jurisdiction was originally exclusively civil. The district judge thus became civil and sessions judge, the latter being the title under which he acted as a criminal court.

During the same time the criminal jurisdiction of the magistrates who were also collectors was largely increased. They had possessed some degree of judicial authority from the year 1787 [1] when they were authorized to hear and determine petty offences such as assaults, and to punish them with imprisonment up to fifteen days or fifteen strokes of a rattan. They were invested by degrees with larger and larger judicial powers subject or not to an appeal to the sessions judge.

Thus the final form of the criminal courts of the East India Company was—the Sudder Nizamut Adaulut, the sessions judges, the magistrates.

These courts had jurisdiction over natives of India only. Side by side with this existed a system designed for the double purpose of administering English law to the Europeans

[1] Beaufort, i. p. 8.

CH. XXXIII. in India and of serving as a counterpoise in their interest to the great powers vested in the Governor-General and his council. These institutions were the Supreme Courts and the justices of the peace. They were introduced gradually. When the British establishments in India were mere factories the President and Members of Council were simply local officers of the chairman and board of directors of a joint-stock company. Being out of the reach of English law and in the absence of any foreign law to which they could submit, they were intrusted with powers which were gradually increased as their operations became more extensive. [1] At first their authority as masters over their servants (and their servants constituted the bulk of the European population) was sufficiently extensive for all practical purposes. They were afterwards empowered by charter to seize and send back to Europe Europeans not in their service. They had also judicial powers of a very vague kind under a charter of Charles II. in 1661. [2] In 1726 Madras, Bombay, and Calcutta were incorporated by charter, a mayor and aldermen being appointed in each, and constituted into a court of record for civil cases. The Governor and certain members of the council were to be justices of the peace and commissioners of oyer and terminer and gaol delivery. They were to hold courts of quarter sessions and try all offences except treason. This charter was varied by another granted in 1753.

In 1773 the concerns of the East India Company had become so important that it was considered necessary for Parliament to interfere upon a large scale with their management. This was effected by the Regulating Act (13 Geo. III. c. 63) which [3] authorised the Crown to establish at Calcutta a Supreme Court consisting of a Chief Justice and [4] three puisne judges. The court was to be a court of record and of oyer and terminer and gaol delivery in and for Calcutta. The charter was to extend to all British subjects in Bengal Behar and Orissa. The Court was to have power to hear and determine all complaints against any of them for any

[1] Mill's *India*, iii. pp. 16, 17.

[2] See Laws relating to India, 1855, p. 477; see too 13 Geo. 3, c. 63, ss. 13 and 20.

[3] Ss. 13, 14.

[4] Reduced to two by 37 Geo. 3, c. 142, s. 1.

[1] "crimes, misdemeanours, or oppressions committed" by them. The charter granted under this act gave to the Supreme Court within its limits all the authority of the Court of King's Bench in England. As to the law to be administered, the charter provided in reference to criminal justice that it should be administered "in such or the like manner, and "form, or as nearly as the condition and circumstances of "the place and the persons will admit of as our courts of "oyer and terminer and gaol delivery do or may in that part "of Great Britain called England." Power to reprieve was given as "cases may arise wherein it may be proper to remit "the general severity of the law." CH. XXXIII.

The effect of this was to confirm, for it had been introduced in 1726, the criminal law of England as a local law binding on all persons in Calcutta and to subject to it as a personal law all European British subjects throughout Bengal, Behar and Orissa. Practically one consequence was to secure complete impunity to all Europeans who committed crimes out of Calcutta, for there were no justices of the peace in all India except the Governor-General and the members of his council and the judges of the Supreme Court, so that if an offence was committed, say at Dacca or Patna, the only mode of proceeding against the offender was for the prosecutor to bring his witnesses to Calcutta, get a bill found before the Calcutta grand jury, and procure a Bench warrant with which he might return to Patna or Dacca and arrest the accused person. To a very slight extent this was remedied in 1793 by 33 Geo. 3, c. 52, ss. 152-155, which gave power to the Governor-General and Governors of the three Presidencies to appoint justices of the peace who were to have the same powers as English justices. I think, however this applied only to powers to take evidence and commit for trial,—at all events no power of summary punishment was given to the justices in India till 1813, when it was enacted by 53 Geo. 3, c. 155, s. 105 that any native might summon any European before any mere magistrate for "any assault, forcible entry, "or other injury accompanied with force not being felony."

[1] Felonies are not mentioned by name, but were no doubt included in the word "crimes."

The magistrate might fine the offender up to R500. Till very recent times, indeed, this was the only penalty which could be inflicted on a European for an offence committed in India out of the Presidency Towns, unless the injured party was prepared to travel hundreds—perhaps in later times thousands—of miles to indict him.

So far I have spoken of the courts of justice established in India for the administration of criminal justice to the natives and to European British subjects by the East India Company and by Act of Parliament respectively. I must now say something of the laws which those courts administered.

The criminal law of Northern and Southern India (in Western India it prevailed less distinctly) was the Mohammedan law introduced by the Mogul conquerors whose power culminated under Akbar in the second half of the sixteenth century. The most authoritative written exposition of the version of this system current in India was the Hedaya or guide, which expresses the views of Aboo Huneefah and his disciples Aboo Yoosuf and Imam Mohammed, who were regarded by the Sooni sect as the principal commentators on the Koran. The Mohammedan criminal law classified all offences as incurring one of these classes of punishments, namely (1) Kisas, or retaliation including diyut—the price of blood; (2) Hud, specific penalties; and (3) Tazeer, or discretionary punishment. Kisas or retaliation applied principally to offences against the person; hud or specific punishment (consisting, in the case of robbery, of mutilation) applied to robbery, theft, adultery, and some other offences; and Tazeer, also called seasut (or discretionary punishment) applied to all other cases. It consisted of public and private reprimands, exposure, sequestration of property, stripes, imprisonment, and even death in extreme cases. The Mohammedan criminal law as stated in the Hedaya presents a curious mixture of great vagueness and extreme technicality. As an instance of its vagueness I may refer to its statements as to political offences. They consist of a few vague words as to the destruction of rebels. As an instance of its technicality it specifies five kinds of homicide. (1) *Katl âmd*, or wilful

homicide by a deadly weapon, the nearest equivalent to our murder. (2) *Katl-shabah-âmd*, homicide like wilful homicide, where the instrument used was not likely to cause death. (3) *Katl-Khata*, erroneous homicide, killing under a mistake either as to the person or the circumstances. (4) Involuntary homicide by an involuntary act, as where a man falls on another from the roof of a house. (5) Accidental homicide by an intervenient cause, as where a man unlawfully dug a well into which another person fell and was drowned.

All sorts of singular rules were laid down by the Mohammedan lawyers as to these five kinds of homicide. Poisoning for some reason was not regarded as "Katl-âmd" or intentional homicide. There was a question whether strangling was or was not, inasmuch as a rope was not a weapon commonly used for the purpose of killing. There were endless refinements as to the cases in which retaliatory punishment (Kisas) was or was not incurred by homicide, and as to the payment of the diyut or blood-fine.

The Mohammedan criminal law was open to every kind of objection. It was occasionally cruel. It was frequently technical, and it often mitigated the extravagant harshness of its provisions by rules of evidence which practically excluded the possibility of carrying them into effect. [1] Thus, for instance, immoral intercourse (*zina*) between a woman and a married man was in all cases punishable by death, whether violence was used or not; but "punishment is barred "by the existence of any doubt on the question of right, "or by any conception in the mind of the accused that "the woman is lawful to him, and by his alleging such idea "as his excuse." Moreover, the evidence of women in such an accusation was rejected. "The law is not satisfied with "less than the positive testimony of four men eye-witnesses "to the fact, and of ascertained credit."

Objectionable in all respects as this system was it was considered necessary to make it the foundation of the criminal law administered by the Company's courts, though its grosser features were removed in some cases by Regulations, in others by decisions of the Sudder courts, and in others by circulars

[1] Beaufort, ii. p. 839.

CH. XXXIII. and orders of various kinds. It became necessary in many instances besides correcting the law to supply its defects, and for this purpose all sorts of expedients were devised, the law of England, instructions from the government, general ideas of justice, analogies, in short almost anything which occurred to those by whom the system was administered were resorted to for that purpose. The result was a hopelessly confused, feeble, indeterminate system of which no one could make anything at all.

A memorial of it survives in the shape of Beaufort's *Digest*, the second edition of which, published in 1857, consists of 1158 4to pages, made up of all the discordant elements to which I have referred. The author was a man of remarkable industry and great talent, but to throw such materials into anything like a rational shape was hopeless.

Of the English criminal law practised in India it is needless to say more than that it was regarded as the English criminal law as it stood in 1726, when the charter was granted by which the Mayor's Court and the Court of Quarter Sessions already referred to were established. How far subsequent acts in which India was not mentioned were in practice held to apply to the presidency towns I am not prepared to say, but however this may have been an exceedingly elaborate act (9 Geo. 4, c. 74) was passed in 1828 which in a characteristically clumsy and unsystematic way extended to India many of the reforms introduced into English criminal law by the legislation of Sir Robert Peel. It abolishes clergy, [1] it provides that indictments are not to be vitiated by the omission of "as appears by the Record," or "with force and arms," nor for putting "statute" for "statutes" nor *vice versâ*. [2] It abolishes benefit of clergy, and [3] questions of course, and it re-enacts verbatim for India many of the provisions of the various consolidation acts then lately passed for England by Sir Robert Peel. It contains in all 137 sections.

Such in substance were the laws and such the courts of justice both for natives and Europeans in Bengal down to 1858, when the government of India was transferred from the Company to the Crown.

[1] S. 12. [2] S. 19. [3] S. 14.

I will now make some remarks as to the laws of the other provinces. The Bengal regulations were introduced as the conquests of the Company increased the extent of their dominions into the greater part of Upper India and in particular into what are now the North-West Provinces. They were also introduced into Madras with few if any material variations, and Supreme Courts similar in all respects to the Supreme Court of Calcutta were established in Madras in 1800 and in Bombay in 1823. Of Madras and the North-West Provinces nothing need in this place be said. The law in force there resembled the law in force in Lower Bengal and so closely as not to require special notice.

Bombay was the first province in India in which a Penal Code was enacted. This was done while Mountstuart Elphinstone was governor by a regulation dated in 1827. The Code is extremely simple and short, and is written more in the style of a treatise than in that of a law. It was, I believe, successful and effective, and it remained in force for upwards of thirty years, till it was superseded by the Indian Penal Code. It applied only to the Company's Courts.

The history of the Criminal Law of some of the other provinces, especially that of the Punjab, is most remarkable though hardly any one is aware of it. The Punjab was annexed to the British Empire by Lord Dalhousie on the 29th March, 1849, in consequence of the defeat of the Sikhs in the second Sikh War. There were a variety of legal and other difficulties as to the manner in which its government was to be provided for. It was absolutely necessary that some kind of legal system should be introduced as the government which had been sufficiently arbitrary under Runjeet Singh (who died in 1839) became absolutely lawless under the various persons who exercised the powers of government after his death. The Mohammedan law which supplied a sort of guide in Bengal was not recognised by the Sikhs, who had habits and customs of their own, and who formed the most important part of the population. When the North-West Provinces were annexed to Lower Bengal the regulations in force in Lower Bengal were introduced into the new districts by a regulation which re-enacted them simply,

CH. XXXIII. Such a course was considered impracticable as regards the Punjab for many reasons, but particularly because the regulations formed an extremely complicated system which could be administered only by persons specially acquainted with it. It was also expensive on account of the separation which it involved between judicial and executive officers. The services of a number of officers sufficient to administer such a province were not to be had, and the legislative council of the Governor-General was naturally incapable of devising and passing at once any other code of laws for the government of the Punjab.

In this state of things the Governor-General took the responsibility of acting upon a view of his powers, the legality of which admitted of much discussion. Regarding the Punjab as a colony acquired by conquest and himself as the representative of the Crown, he, by a simple despatch authorised three Commissioners, namely, Lord Lawrence, Sir Henry Lawrence, and Mr. Maunsell to govern the country according to their own discretion, taking as their general guide the regulations in force in the North-West Provinces. The three commissioners formed at first a Board of Government, but Lord Lawrence was subsequently appointed first Chief Commissioner and afterwards Lieutenant-Governor of the province. First the three commissioners and afterwards Lord Lawrence proceeded to cause short treatises, which acted as codes, to be drawn up by some of the officers under their orders, by which codes the work of governing the province was carried on. They were simple and rational works put together somewhat roughly, but laying down in a distinct way all the leading points necessary to be determined for such a purpose. The first Code was the work of Sir Richard Temple, afterwards so well-known for his eminent services in [1] all the highest positions in India. It related as well to criminal as to civil matters, but some time after its publication the part which related to criminal law and procedure was recast and developed by Sir Charles Aitchison, now (1882) Lieutenant-Governor of the Punjab,

[1] He was at different times Resident at Hyderabad, Chief Commissioner in the Central Provinces, Financial Member of Council (when I had the honour to be his colleague as Legal Member), Lieutenant-Governor of Bengal, and Governor of Bombay.

then one of the first set of civil servants who won their places by competition. CH. XXXIII.

The validity of these laws might possibly have been successfully disputed had there been any means of testing it, but they were all confirmed by the Indian Councils Act of 1861 (24 & 25 Vic. c. 67, s. 25). They afford a memorable instance of the truth that extremely short and simple provisions, drawn with no particular skill by young men totally unpractised in parliamentary drafting may be instruments of government quite as efficient for all practical purposes as the most elaborate codes prepared by the most skilful draftsmen with the greatest exactness and precision of which language is capable.

Such was the position of the Criminal Law in the most important parts of India when the government was taken over by the Crown from the East India Company in 1858.

In order to explain the legislation of the new government it is necessary to go back to the year 1834. The great defects of the old system, its weakness, its confusion, its utter want of principle and unity had long been recognised by all who had to do with Indian administration, though I have been told by persons well able to judge that the older generation of civilians had a positive liking for the disorderly system which they administered, that they regarded the Mohammedan law as being in a way the birthright of the natives, and the existence of Mohammedan law officers in the courts as a piece of preferment which the Mohammedans as a class greatly valued, which last opinion was unquestionably well founded. Different views, however, prevailed when the Charter Act of 1833 (3 & 4 Will. 4, c. 85), the last, as it turned out, of the Charter Acts, was passed. It came on for consideration in the year which followed the Reform Bill, and at a time when much attention had been drawn to the subject of Law Reform in general, and to Reform of the Criminal Law in particular by Sir Robert Peel's legislation and by the works of many writers. None of these had been more conspicuous than Bentham, and by no one had Bentham's doctrines been preached and applied so zealously as by his favourite disciple James Mill, who had written his history of British India under the influence of Bentham's writings—an influence

CH. XXXIII. traceable in the most unmistakable manner whenever he refers to any subject connected with law or lawyers. It was considered that the time had arrived for legislation on a large scale in India, and this certainly was a great opportunity for it.

By the Act of 1833 the Governor-General of Bengal was converted into the Governor-General of India. [1] He was empowered for the first time to legislate for the whole of India, the legislative powers of the other Indian governments being abolished. In order that this power might be properly exercised it was provided by s. 40 of the Act that a fourth ordinary member should be added to the Council who, however, was not to be "entitled to sit or vote in the said Council "except at meetings thereof for making laws and regulations." [2] Lord Macaulay was appointed to fill this office. Another section of the Act of 1833 (s. 53) had provided for the appointment by the Governor-General of a Law Commission for the purpose of establishing a set of courts and of laws suitable for all persons, Europeans or others, resident in the said territories.

On Lord Macaulay's arrival in India a Commission was occordingly appointed consisting of himself, Mr. Millet, and Sir John M'Leod. During the four years (1834—8) of his

[1] The power under which the regulations were enacted is by no means clear. By 13 Geo. 3, c. 63, ss. 36 and 37, the Governor-General in Council is empowered to make "rules, ordinances, and regulations not being repug-"nant to the laws of this realm," and to impose "reasonable fines and for-"feitures" for the breach of them, but they are to be made "for the good "order and civil government of the Company's settlement at Fort William in "Bengal, and other factories and places subordinate, or to be subordinate, "thereto," and not for "the kingdoms of Bengal, Behar, and Orissa," which is the description (see sec. 7) of the territories to be governed by them. In short, they give power to make bye-laws for Calcutta and its dependent factories. The regulations enacted by Lord Cornwallis, which had a far wider scope, are, however, recognised by 37 Geo. 3, c. 142, s. 8. This act recites that "certain regulations for the better administration of justice among the "native inhabitants and others, being within the provinces of Bengal, Behar, "and Orissa, have been from time to time framed by the Governor-General in "Council in Bengal." It then goes on to enact that all regulations passed by the government affecting the rights, properties, and persons of the subjects "shall be formed into a regular Code, and printed with translations in the "country languages, and that the gronnds of every regulation shall be prefixed "to it." This assumes the existence of the legislative power of the Governor-General in Council, but does not directly grant it to him. The Provincial Courts are ordered to "regulate their decisions by such rules and ordinances "as shall be contained in the said regulations." I suppose that in 1797 a delicacy was still felt in giving the Indian Governor-General direct power to legislate for part of the dominions of the Great Mogul.

[2] It is somewhat singular that it was offered in the first instance to my father, the late Sir James Stephen.

residence in India, the Commission settled the draft of what long afterwards became the Indian Penal Code, of which draft Lord Macaulay was either the sole or the principal author. I am conscious of being a partial critic of this work for many reasons. But it seems to me to be the most remarkable, as I think it bids fair to be the most lasting, monument of its principal author. There is a fashion in literature which may diminish the influence and popularity of his other writings, but the Penal Code has triumphantly supported the test of experience for upwards of twenty-one years during which time it has met with a degree of success which can hardly be ascribed to any other statute of anything approaching to the same dimensions. It is, moreover, the work of a man who, though nominally a barrister, had hardly ever (if ever) held a brief, and whose time and thoughts had been devoted almost entirely to politics and literature.

The draft remained in the shape of a draft for no less than twenty-two years. This is probably to be accounted for by the extreme aversion which for a long time before the mutiny was felt by influential persons in India to any changes which boldly and definitely replaced native by European institutions. It appeared in every way the safer course to alter and interfere as little as possible, although the success of a policy conceived in a totally different spirit and triumphantly carried out in the Punjab might have taught a different lesson. The suppression of the mutiny and the transfer of the government from the Company to the Crown made a great change and gave an extraordinary impetus to legislation. Amongst other measures the Penal Code was passed into law as Act XLV. of 1860, and was followed a year afterwards by Act XXV. of 1861—the first of three successive versions of the Code of Criminal Procedure.

The Penal Code did not become law precisely in the shape in which it was drawn. It underwent minutely careful and elaborate revision at the hands of the Legislative Council, established under the last of the acts regulating the powers of the East India Company (16 & 17 Vic. s. 95, 1853). Sir Barnes Peacock, afterwards the last Chief Justice of the Supreme Court of Calcutta, and now (1882) a

CH. XXXIII. Member of the Judicial Committee of the Privy Council, was then the Legal Member of Council, and had charge of the Bill. The long delay in the enactment of the Penal Code had thus the singular but most beneficial result of reserving a work which had been drawn up by the most distinguished author of the day for a minutely careful revision by a professional lawyer, possessed of as great experience and as much technical knowledge as any man of his time. An ideal code ought to be drawn by a Bacon and settled by a Coke.

The Indian Penal Code may be described as the criminal law of England freed from all technicalities and superfluities, systematically arranged and modified in some few particulars (they are surprisingly few) to suit the circumstances of British India. I do not believe that it contains any matter whatever which can have been adopted from the Mohammedan law. The code consists of 511 sections, and it deserves notice as a proof of the degree in which the leading features of human nature and human conduct resemble each other in different countries, that about the same number of enactments are contained in three other works of the same sort. The part of the Draft Criminal Code of 1879, which related to substantive law, contained 426 sections; the French *Code Pénal*, 484; and the German Criminal Code, 370, of which a good many are subdivided. The English codes are much longer than the others, for a reason to which I shall refer hereafter; but if the number of sections or articles is taken to indicate roughly the number of acts regarded as offences the correspondence between the four is remarkable.

The arrangement of the Indian Penal Code is substantially similar to that of other penal codes. Indeed the arrangement of the subject is obvious and natural in itself. The general principles which apply to the whole subject naturally come first, and are naturally followed by crimes affecting the public, crimes affecting the person, and crimes affecting the property of individuals. This mode of dealing with the subject is so natural that it can hardly fail to suggest itself to every one who treats the matter systematically. It closely resembles, for instance, the method of Hale's *Pleas of the Crown*, and it is followed both by the *Code Pénal* and the *Strafgesetzbuch*.

The style in which the Indian Penal Code is written is remarkable in many ways. In a literary point of view parts of it have much in common with Lord Macaulay's more popular compositions, though parts of it, as it now stands, could never have come from his pen. The love of direct explicit statement, the taste for expressing distinctions by the juxtaposition of sentences similarly constructed but with different leading words, are common to both. The following section could hardly have been written by any one else :—

" DEFAMATION, 499.—Whoever, by words either spoken or " intended to be read, or by signs, or by visible representa- " tions, makes or publishes any imputation concerning any " person, intending to harm, or knowing or having reason to " believe that such imputation will harm the reputation of such " person, is said, except in the cases hereinafter mentioned, to " defame that person.

" EXPLANATION 4.—No imputation is said to harm a per- " son's reputation unless that imputation directly or indirectly, " in the estimation of others, lowers the moral or intellectual " character of that person, or lowers the character of that " person in respect of his caste or of his calling, or lowers " the credit of that person, or causes it to be believed that " the body of that person is in a loathsome state, or in a " state generally considered as disgraceful."

The way in which " that person " is brought in five times over without being once represented by a pronoun, personal or possessive, is eminently characteristic, and there is a plain-spoken emphasis in the concluding lines about " the body of that person " which must have given the author real pleasure. It is easy to fancy him asking himself whether "loathsome" was explicit enough, and thinking that it would lose nothing by a little variation. Any one who takes the trouble to try the experiment will, I think, be of opinion that any alteration in the order of the different clauses of these sentences, or in their words, would either alter the sense intended to be conveyed or make it less easy of apprehension or less pointed in expression. In Lord Macaulay's essays and historical writings these qualities are sometimes carried so far as to be out of keeping with the subjects discussed. You cannot truthfully describe the

CH. XXXIII. qualities of a remarkable man or the details of a historical event with a definite precision which makes each quality and each incident fit together like the squares of a chessboard, but the absence of shading, which is unnatural and unpleasing in a picture, is indispensable in a mathematical diagram, and the sharp contrasts which sometimes pall upon the reader of a history are just what are wanted in a penal code.

Whatever may be the literary characteristics of the style of the Penal Code, its style has claims to notice of a much more important kind. It is as unlike an Act of Parliament on the one side as it is unlike an Indian Regulation on the other. When Lord Macaulay was in India [1] the act had not been passed which enables Parliamentary draftsmen to use full-stops, and from about 1820 to 1830 was, I think, the period in which statutes were lengthier, more drawling and tedious, more crammed with surplusage and tautology than they ever were either before or since.

The Indian Regulations were composed in a totally different style. They always began (in compliance with the statutory provision already quoted), with a statement of the reason why they were enacted, and these statements are written fully in simple natural language, like that of a careful despatch. The same may be said of the enacting part, though the natural difficulties of the subject dealt with are often too much for the [2] draftsmen.

The Penal Code was the first specimen of an entirely new and original method of legislative expression. It has been found of the greatest possible use in India, and has been employed in all the most important acts passed since the Penal Code. The mode adopted is as follows:—In the first

[1] 13 & 14 Vic. c. 21, s. 2 (1850). "Be it enacted that all acts shall be "divided into sections if there be more enactments than one, which sections "shall be deemed to be substantive enactments without any introductory words." Before this act was passed every act was one interminable sentence, thus: "An act" &c.; "whereas," &c.; "Be it enacted," &c.; "and be it en-"acted," &c. The draftsmen were apparently invariably under the impression that if they once really stopped they would never be able to go on again.

[2] A good illustration is afforded by the famous Regulation VII. of 1822, which was for about fifty years to the North-West Provinces what Lord Cornwallis's Permanent Settlement still is to Lower Bengal. It instituted the North-West system of land settlement, and was one of the most important laws ever passed in India. It was difficult to understand to a degree which no one unacquainted with the subject could appreciate.

place the leading idea to be laid down is stated in the most explicit and pointed form which can be devised. Then such expressions in it as are not regarded as being sufficiently explicit are made the subject of definite explanations. This is followed by equally definite exceptions, to which, if necessary, explanations are added, and in order to set the whole in the clearest possible light the matter thus stated explained and qualified is illustrated by a number of concrete cases.

For instance the leading definition as to defamation is given in the terms just quoted. This is followed by four explanations, the first as to imputations on deceased persons, the second on companies or collections of persons, the third as to imputations by way of irony, and the last as to the limits of the word "imputation." Six exceptions follow stating the cases in which imputations may lawfully be cast upon particular persons, two of which are the subjects of further explanation, most of them are specifically illustrated by examples.

The result is that it is practically impossible to misunderstand the Penal Code, and though it has been in force for more than twenty years, and is in daily use in every part of India by all sorts of courts and amongst communities of every degree of civilization, and has given rise to countless decisions no obscurity or ambiguity worth speaking of has been discovered in it.

I have occasionally heard this feature in the Penal Code spoken of with a kind of contempt by English lawyers. They say that it may be excused as being suitable for India because the Code has to be administered by magistrates, most of whom are not lawyers. The same is true of the Criminal Law of England, but apart from this it is surely obvious to remark that if perfect clearness is a quality to be desired in penal law it seems unwise to undervalue or neglect methods of obtaining that result which have been so successful as to prevent even unprofessional persons from mistaking the meaning of an extensive body of law. To do so implies that the law ought to be fully intelligible to trained lawyers only. It would seem strange to say by way of depreciating a

CH. XXXIII. particular kind of telescope that it enabled people with bad eyes to distinguish objects at a great distance.

I admit, however, that I do not think that this method of legislative expression could be advantageously employed in England. It is useful only where the legislative body can afford to speak its mind with emphatic clearness, and is small enough and powerful enough to have a distinct collective will and to carry it out without being hampered by popular discussion. A criminal code drawn in the style of the Indian Penal Code could never be passed through Parliament, and even if it could I do not think English judges and lawyers would accept and carry out so novel a method of legislating.

In several points affecting the whole of the Indian Penal Code, warning has been taken from the defects of the English criminal law. The Code, wisely, as I think, for reasons already assigned, makes no attempt at the classification of crimes. It knows nothing of either felony or misdemeanour. It carefully avoids the use of words which have been the occasion of much misunderstanding and confusion in English law. It does not for instance contain the word "malice" or its derivatives. Such words, involving moral considerations, as it does employ, are defined with extreme exactness. For instance, "dishonestly," which frequently occurs, is [1] defined to mean doing anything with the intention of causing wrongful gain to one person, or wrongful loss to another. [2] "Wrongful gain" is gain by unlawful means of property to which the person gaining is not legally entitled. "Wrongful loss" is the loss by unlawful means of property to which the person losing it is legally entitled.

I will now proceed to notice the principal matters contained in the Code itself which appear interesting in connection with what has already been said as to the law of England.

The Code begins with a preliminary chapter setting forth the extent of the Code, and the time when it is to come into operation. [3] One of the sections by which this is effected deserves notice because it might be useful as a precedent if the criminal law of England should ever be codified. The

[1] S. 24. [2] S. 23. [3] S. 2.

existing criminal law of India was not specifically repealed by the Penal Code, but it provided that every person should be liable to punishment under it, *and not otherwise*, for every act to which it applied. The effect of this was that if after the Penal Code came into force any one were to do an act which would have been criminal before it passed, and which was not forbidden by its provisions, he would still be liable to punishment under the old law. I never heard that any such act ever took place, though it is just possible that in the Presidency towns, where before the Penal Code came into operation the law of England was in force, the common law as to seditious words and seditious libel might be wider than the Penal Code, and so continue in force to some limited extent. Such a provision would be useful rather as an answer to any cry which might be raised as to the danger of a general repeal of the unwritten common law than upon any more serious grounds. CH. XXXIII.

The second chapter is entitled not very happily "General Explanations," and consists partly of a series of definitions of the senses in which words are used, and partly of a statement of certain general doctrines of more or less importance. The idea by which the whole Code is pervaded, and which was not unnaturally suggested by parts of the history of the English law, is that every one who has anything to do with the administration of the Code will do his utmost to misunderstand it and evade its provisions; this object the authors of the Code have done their utmost to defeat by anticipating all imaginable excuses for refusing to accept the real meaning of its provisions and providing against them beforehand specifically. The object is in itself undoubtedly a good one, and many of the provisions intended to effect it are valuable as they lay down doctrines which may be needed in order to clear up honest doubts or misunderstandings. For instance, it is perfectly right to say, [1] "a person is said to cause an "effect 'voluntarily' when he causes it by means whereby "he intended to cause it, or by means which at the time of "employing those means he knew or had reason to believe "to be likely to cause it." It is also quite right [2] to define

[1] S. 39.

[2] S. 30.

CH. XXXIII. the expression "valuable security," and [1] the word "document," for the extent of these expressions might well be matter of reasonable doubt in good faith.

I think, however, that to go beyond this, and to try to anticipate captious objections, is a mistake. Human language is not so constructed that it is possible to prevent people from misunderstanding it if they are determined to do so, and over-definition for that purpose is like the attempt to rid a house of dust by mere sweeping. You make more dust than you remove. If too fine a point is put upon language you suggest a still greater refinement in quibbling. This I think is a not uncommon fault in Indian legislation, and the Penal Code was the first example of it. For instances it [2] defines "life" as the life of a human being unless the contrary appears from the context. So of death. [3] "Animal" is also defined as "any living creature other than a human being," a definition not only superfluous, but of doubtful correctness. It would include an angel, frog spawn, and probably a tree.

This introductory chapter is followed by a chapter headed "On Punishments." The punishments inflicted by the Indian Penal Code are death by hanging, transportation for life, imprisonment with or without hard labour, which may extend to fourteen years, forfeiture of property, and fine. Whipping is inflicted not under the Code, but under the provisions of an act passed in 1864. Death is the punishment of waging war against the Queen, murder, attempts to murder by convicts under sentence of transportation for life, false evidence causing the execution of an innocent man, and of all members of gangs of robbers (dacoits) numbering five or more, of

[1] S. 29. [2] Ss. 45 & 46.

[3] S. 47. The most singular definition in the whole Code is the definition of "force" in s. 349. "A person is said to use force to another, if he causes "motion, change of motion, or cessation of motion to that other; or if he "causes to any substance such motion, or change of motion, or cessation of "motion as brings that substance into contact with any part of that other's "body, or with any thing which that other is wearing, or carrying, or with "any thing so situated that that contact affects that other's sense of feeling, "provided that the person causing the motion, or change of motion, or cessa- "tion of motion, causes that motion, cessation of motion, or change of motion in "one of the three ways hereinafter described: first, by his own bodily power; "secondly, by disposing any substance in such a manner that the motion, or "change or cessation of motion, takes place without any further action on his "part, or on the part of any other person; thirdly, by inducing any animal "to move, to change its motion, or to cease to move."

whom any one in committing robbery commits murder. In no case, however, is the punishment of death absolute. The court has always a discretion to sentence to transportation for life, and in the case of dacoity to rigorous imprisonment up to ten years as an alternative. The punishment of transportation is inflicted only where the sentence is for life, except in cases of what we should describe as treason felony, where the sentence may be for any term. There is in nearly every case an alternative power of sentencing to imprisonment up to ten or in some cases fourteen years. The maximum sentences of imprisonment vary according to the offence from fourteen years to a month. There is only one case, so far as I know, in which a minimum term of imprisonment is prescribed. This is the case of robbery accompanied by the use of a deadly weapon, or causing grievous hurt or attempting to cause such hurt, or to murder, in which case the offender must be imprisoned for seven years at least (s. 397). In all this the English law is closely followed, especially in the rejection of minimum punishments, and in the wide discretion left to the judges.

The chapter on punishments is followed by one entitled "General Exceptions," which deals with the question of responsibility. The title of the chapter is meant to imply (see s. 6) that all the exceptions contained in it are to be considered to be embodied in every definition of crime in the body of the Code. These general exceptions embody the law of England as it stands more simply, and in a manner which in my opinion is more satisfactory in several respects, than the corresponding part of the Draft Criminal Code of 1879. It goes at great length into the subjects of consent and compulsion, and at considerable length into the subject of the right of private defence. I do not, however, agree with its provisions as to compulsion. One provision might well be adopted in this country. [1] It says in substance that the causing of "harm so slight that no person of ordinary sense "and temper would complain of such harm is not an offence."

The preliminary part concludes with a chapter on abetment and the concealment of offences which is not very unlike the

[1] S. 95.

CH. XXXIII. English law as to accessories before and after the fact, but it contains nothing of special interest.

These matters are followed by the definitions of offences. I shall notice such of these only as afford occasion for some special remark.

[1] The provisions as to offences against public tranquillity comprise all breaches of the peace from waging war against the Queen (s. 121) to an affray (s. 159). The only [2] offence corresponding to high treason punished by the Penal Code as it originally stood was waging war against the Queen, preparing to wage such war, and concealing a design to wage such war. Conspiring to wage war and making use of seditious language and writing were not included in the original Code. An act amending the Code was passed whilst I was Legal Member of Council which in substance inserted in the Code the equivalent of the English Treason-Felony Act. It was found to be required by circumstances. A mere conspiracy to wage war was not an offence against the Code unless some act or illegal omission was done in pursuance of it. [3] The law relating to riots and unlawful assemblies is very full and elaborate, but it is remarkable that the Penal Code contained no provision at all as to seditious offences not involving an absolute breach of the peace. It says nothing of seditious words, seditious libels, seditious conspiracies, or secret societies. The additions made in 1870 provide to a certain extent for the punishment of such offences, but they do so very imperfectly. During the rule of the East India Company there was always a reluctance on the part of the Company to behave and to legislate as unqualified sovereigns would naturally behave and legislate, and upon the assumption of the government by the Crown it was not considered necessary apparently to make any change.

[4] Offences relating to public servants naturally form a very important part of the Indian Penal Code, as the official body in India occupies a position and is charged with functions of far greater importance than those which belong to any corresponding body of officials in the world, possibly with the exception of Russia. On the one hand, any approach to

[1] Ss. 121-160. [2] Ss. 121-124. [3] Ss. 141-161. [4] Ss. 161-190.

corruption of any sort, or to oppression, or to official misconduct prompted by any indirect motive, is forbidden under heavy penalties by [1] enactments of the most minute and comprehensive character. On the other hand, their lawful authority is upheld by an equally elaborate [2] series of provisions punishing every sort of unlawful resistance or disobedience to it. For instance, [3] "whoever being legally bound "to state the truth on any subject to any public servant "refuses to answer any question demanded of him touching "that subject by such servant" may be imprisoned for six months and fined a thousand rupees. [4] To give a public servant false information in order to cause him to use his public authority to the injury or annoyance of any person renders the offender liable to the same punishment The widest of these enactments is [5] one which provides that it is an offence punishable with fine and imprisonment to disobey any order lawfully promulgated by any public servant. [6] To threaten a public servant in order to affect him in the discharge of his duty is punishable with imprisonment up to two years, and to threaten any person in order to deter him from applying for protection to any public servant is punishable with imprisonment up to one year.

[7] The provisions relating to the giving of false evidence, fabricating false evidence, destroying documents to prevent their production in evidence, and similar offences, are characteristically elaborate. Probably there is no country in the world in which they are so much needed as in India, though I must own that I am less impressed with the supposed contrast between England and India in this respect than persons who have had less experience of the quantity of perjury which is committed every day with practical impunity, or at most very inadequate punishment, in England. One [8] section punishes with death the giving or fabrication of false evidence in a capital case by reason of which an innocent person is condemned and executed. If the innocent person is not condemned and executed the punishment is transportation for life. [9] In all other cases of perjury, intended to cause a person to be

[1] Ss. 161-168. [2] Ss. 172-182. [3] S. 179. [4] S. 182. [5] S. 188.
[6] S. 189. [7] Ss. 191-204. [8] S. 194. [9] S. 195.

CH. XXXIII

convicted of crime punishable with transportation for life or imprisonment for seven years, the punishment of the false evidence is that of the offence of which the subject of the false evidence is accused.

The subject of public nuisances is very fully provided for in sections 268-289, which provide punishment for a great number of offences which in England would not be punishable at all, and would not in some cases afford ground even for a civil action. For instance, a person is [1] liable to six months' imprisonment and fine who negligently does any act which he knows or has reason to believe to be likely to spread the infection of any disease dangerous to life. The punishment is [2] extended to two years' imprisonment if the act is done "malignantly." The authors of the Code would not say "maliciously," and wanted to say something more than "voluntarily and without justification or excuse." I think this is the only instance in the whole Code in which an adverb making undefined moral guilt an element of a crime is made use of.

Many of the sections referred to punish negligent acts dangerous to human life whether death or bodily harm is caused or not. This is highly characteristic of the Code. Its authors have throughout been much impressed with the theory that neither the motive nor the result, but the intention of an act ought to be the measure of its criminality. Hence they have never referred to the motive for an offence except in the single instance just mentioned; and on the other hand they punish in a [3] series of sections mere carelessness irrespectively of the results which it may produce. Thus [4] to ride or drive so rashly as to endanger life, or to be likely to cause hurt or injury to any other person, is punishable with six months' imprisonment, even if no harm is done to any one. The same punishment is awarded to similar carelessness as to [5] poison, [6] fire, [7] explosives, [8] machinery, [9] repairing buildings, and the care of [10] animals. The section as to machinery is of the most sweeping kind. It extends to every one who "knowingly or negligently omits to take such order with any

[1] S. 269. [2] S. 270. [3] Ss. 279-289. [4] S. 279. [5] S. 284.
[6] S. 285. [7] S. 286. [8] S. 287. [9] S. 288. [10] S. 289.

" machinery in his possession or under his care as is sufficient " to guard against any probable danger to human life from " such machinery." This goes far beyond any provisions as to fencing machinery in our factory acts. For instance, the Factory and Workshop Act, 1878 (41 Vic. c. 16), contains elaborate directions as to fencing machinery in motion, dangerous vats and structures, grindstones, and cleaning machinery in motion (ss. 5-9), but the utmost consequence of not observing these rules is liability to an inspector's order to fulfil the requirements of the law, in default of which the owner may (s. 81) be fined £10. If death were caused by an omission to perform any of the duties imposed by the act, the offender would be guilty of manslaughter, and liable to any secondary punishment from penal servitude for life downwards. If bodily injury short of death were caused, he would be liable to an action for damages to the injured person. In India the leaving of any dangerous machinery unfenced would render the person in default liable to six months' imprisonment, but no further consequence would follow if death were caused.

The scheme of the Indian Penal Code thus excluded the crime of manslaughter by negligence. This appeared to me to involve neglect of a matter which ought to be taken into account in penal legislation,—the effect which an offence produces on the feelings and imagination of mankind. I accordingly carried through the Legislative Council an act which added a section (304A) to the Code, punishing specifically the causing of death by negligence. If two persons are guilty of the very same act of negligence, and if one of them causes thereby a railway accident, involving the death and mutilation of many persons, whereas the other does no injury to any one, it seems to me that it would be rather pedantic than rational to say that each had committed the same offence, and should be subjected to the same punishment. In one sense each has committed an offence, but the one has had the bad luck to cause a horrible misfortune, and to attract public attention to it, and the other the good fortune to do no harm. Both certainly deserve punishment, but it gratifies a natural public feeling to choose out for punishment the one who actually has caused great harm, and the effect in the way of preventing

CH. XXXIII. a repetition of the offence is much the same as if both were punished.

Another reason for making the addition above referred to was that though the sections under consideration punish many kinds of negligence dangerous to life, many others, just as dangerous, are omitted. The sections in question would not meet the case of carelessness in a railway servant. I do not think they would meet the case of negligence in the ventilation of a mine, and though s. 288 has reference to carelessness in pulling down buildings it is silent as to carelessness in erecting them. The section as to causing death by rash or negligent acts covers every case of negligence which causes death.

The next series of [1] sections requiring notice are contained in chapter xv., headed "Of Offences relating to Religion." They present an extraordinary contrast to the English law on that subject as it stood in early times, though they reflect precisely the tone of modern English sentiment. All the offences forbidden are in the nature of insults to existing creeds. They appear to me to carry the principle of tolerating and protecting all religions whatever to a length which cannot be justified, and which might lead to horrible cruelty and persecution if the government of the country ever got into Hindoo or Mohammedan hands. Section 298 renders every one liable to a year's imprisonment who, "with the deliberate "intention of wounding the religious feelings of any person, "utters any word or makes any sound in the hearing of that "person, or makes any gesture in the sight of that person, or "places any object in the sight of that person." To say nothing of the ease with which any one might falsely accuse another of uttering a word or making a sound or a gesture of an offensive nature, this would surely cover every attempt made to convince any one that his religious opinions are untrue. It is impossible to convince any one that he is in error upon religious subjects without causing him great pain if he really believes in his creed, and the act of addressing cogent and earnest arguments to him on the subject must of

[1] Ss. 295-298.

necessity involve a deliberate intention of wounding his feelings. A man who tries to tear from another beliefs which colour the whole of life intends to wound his religious feelings as deliberately as a surgeon who prepares to perform a terrible operation intends to wound his flesh. In each case the motive may be good, but in each the intention is to inflict a wound. Of course this was not the meaning of the authors of the Code, and the section in question would, in the hands of modern English magistrates, be interpreted to apply only to wanton insults. It could be very differently interpreted by natives. It is characteristic of English people to consider their modern liberalism as not only true but self-evident, and certain to be popular at all places and in all times. In fact, it is a very modern growth, and extends over a small part of the world. I suspect that the true feelings of a large part of the native population of India were expressed by a Hindoo of considerable position and ostentatiously English tastes, who one day confidentially observed to a high English official, after looking round to see that nobody was listening, "For my part, "Sahib, I think everybody who changes his religion, whatever "it happens to be, ought to have seven years' rigorous imprison-"ment. Don't you?" Instances might be given to show that English civilians are by no means always free from a wish of this kind. The line taken by some prominent official persons in reference to a proposal made and carried to provide a form of marriage for those who had ceased to be Hindoos or Mohammedans without becoming Christians threw light upon this. They saw no hardship at all in the conclusion that a man, who was neither a Christian, a Mohammedan, a Hindoo, nor a Buddhist, should be unable to contract a valid marriage.

The offences against the public are followed in the Indian Penal Code by offences affecting the human body, the first of which is homicide.

The definitions of culpable homicide and murder are, I think, the weakest part of the Code. They are obscure, and it is obvious to me that the subject had not been fully thought out when they were drawn. "Culpable homicide" is first defined, but homicide is not defined at all, except

CH. XXXIII. by way of explanation to culpable homicide. Moreover, culpable homicide, the genus, and murder, the species, are defined in terms so closely resembling each other that it is difficult to distinguish them. The definitions are these:—

[1] "Whoever causes death by doing an act with the intention "of causing death, or with the intention of causing such "bodily injury as is likely to cause death, or with the know-"ledge that he is likely by such an act to cause death, "commits the offence of culpable homicide." Having regard to the definition of "voluntarily" in s. 39, already quoted, this would be more shortly expressed by saying, "whoever "voluntarily causes death is guilty of culpable homicide."

Murder is thus [2] defined:—

"Except in the cases hereinafter excepted, culpable homicide "is murder if the act by which the death is caused is done "with the intention of causing death; or,

"2. If it is done with the intention of causing such bodily "injury as the offender knows to be likely to cause the death "of the person to whom the harm is caused; or,

"3. If it is done with the intention of causing bodily "injury to any person, and the bodily injury intended to be "inflicted is sufficient in the ordinary course of nature to "cause death; or,

"4. If the person committing the act knows that it is so "imminently dangerous that it must in all probability cause "death, and commits such act without any excuse for incur-"ring the risk of causing death or such injury as aforesaid."

Then follow five exceptions.

The difficulty of these sections is that the definitions of culpable homicide and murder all but repeat each other; but not quite, or, at least, not explicitly. The effect of the whole would be little altered if it was stated thus:—

"Whoever voluntarily causes the death of any person is "guilty of murder, except in the cases hereinafter mentioned."

"Whoever voluntarily causes the death of any person in "any of the cases hereinafter mentioned is guilty of culpable "homicide."

This appears from the fact that it is difficult, though perhaps

[1] S. 299. [2] S. 300. To begin with an exception is extremely clumsy.

not impossible, to suggest any case of culpable homicide, other than the five excepted cases, which is not murder.[1]

The excepted cases are, (1) homicide under provocation, as to which the English law is somewhat enlarged; (2) homicide by an act done in excess of the right of self-defence; (3) homicide by a public servant in the discharge of a duty, by acts which he believes to be necessary for its due discharge, but which are not so in reality; (4) homicide upon a sudden quarrel; (5) homicide by consent on a person over eighteen years of age. This would cover duelling and suttee.

[1] Expressed in a tabular form the two crimes are thus related :—

Culpable homicide is causing death by doing an act with any of the intentions undermentioned :—	Culpable homicide is murder if the act by which death is caused is done with any of the intentions undermentioned :—
1. An intention to cause death.	1[1]. An intention to cause death.
2. An intention to cause bodily injury likely to cause death.	2[1]. An intention to cause such bodily injury as the offender knows to be likely to cause the death of the person to whom harm is caused.
	3[1]. An intention to cause bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.
3. Knowledge that he is likely by such act to cause death.	4[1]. If the person committing the act knows that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death by such injury.

Cases 1 and 1[1] are identical. Case 2 appears to me to be exactly equivalent to Cases 2[1] and 3[1] taken together, for the element of knowledge which is included in 2[1] and absent from 2 is also absent from 3[1], so that 2[1] and 3[1] together are equal to 2. Case 3 and Case 4[1] differ only in the circumstance that 4[1] is more explicit. Murder under 4[1] requires the absence of any excuse for running the risk, but homicide could hardly be intended to be culpable if such an excuse was present, especially as the general exception in s. 81 appears to meet the case exactly.

CH. XXXIII.

Homicide by consent is the only case in which the Indian Penal Code is less rigorous than the English law. It ought, however, to be observed that though murder in India is usually punished with death, the judge may sentence the offender to transportation for life.

It is remarkable that these provisions do not meet the case of causing death by personal injuries not likely or intended to cause it, or by negligence. Of negligence I have already spoken. The remarks I have made will also apply to the offence of causing death by comparatively unimportant injuries, such as a blow with a fist or with a slight stick, or by throwing a man down in wrestling. Under the Penal Code the death in such cases is regarded as accidental, and the blow or other injury as an offence to be punished under one or other of the provisions relating to "Hurt," or criminal force, which I now proceed to consider.

Hurt is [1] defined as causing "bodily pain, disease, or in- "firmity, to any person," and is divided into "grievous hurt" and hurt simply. [2] "Grievous hurt" includes emasculation, permanent privation of the sight of either eye, or the hearing of either ear, privation, destruction, or permanent impairing of any member or joint, disfiguration of the head or face, fracture or dislocation of a bone, anything which endangers life or disables the sufferer from pursuing his ordinary avocations for twenty days. This provision is adopted from the French *Code Pénal*, article 309. I do not think it happy, as it attempts to define what is essentially indefinite. The English "grievous bodily harm" is far better. The artificial and arbitrary character of the enactment may be illustrated in many ways. A slight injury to an artist's forefinger, or to a surgeon's wrist, might easily prevent him from following his usual pursuits for three weeks, and so amount to grievous hurt, while an injury which caused a man to be afflicted with tic doloureux for the rest of his life would not be considered grievous.

The punishments for the infliction of hurt are varied in all manner of ways, according as the hurt is grievous or not, and

[1] S. 319. [2] S. 320.

caused voluntarily, rashly, and negligently, with or without provocation, and with or without any bad ulterior object. CH. XXXIII.

[1] Assault and criminal force are most elaborately defined, but call for no particular notice.

[2] The provisions as to kidnapping, abduction, slavery, and forced labour, are also most elaborate, and form a singular contrast to the meagreness of the law of England on these subjects. The reason is obvious: the offences in question were common in India and almost unknown in England.

Of the other offences against individuals I will mention a few only, as they are for the most part substantially the same as those punished by the law of England, and present few variations of much interest. The following observations, however, may be made.

The law relating to theft represents the law of England in its maturity, and freed from most of the intricacies which distorted it so strangely.

The three forms of the offence on which I have already dwelt are thus distinguished in the Indian Penal Code :—

"S. 378. Whoever intending to take dishonestly any "moveable property out of the possession of any person, "without that person's consent, moves that property in "order to such taking, is said to commit theft.

"S. 403. Whoever dishonestly misappropriates or converts "to his own use any moveable property shall be punished, &c.

"S. 405. Whoever being in any manner intrusted with "property, or with any dominion over property, dishonestly "misappropriates or converts to his own use that property, "or dishonestly uses or disposes of that property, in violation "of any direction of law prescribing the mode in which such "trust is to be discharged, or of any legal contract, express "or implied, which he has made touching the discharge of "such trust, or wilfully suffers any other person to do so, "commits criminal breach of trust."

These three sections cover all the ground which is covered in English law by theft, embezzlement, and the various breaches of trust which are punished, besides covering other breaches of trust and misappropriations which are not so

[1] Ss. 349-359.

[2] Ss. 359-374.

CH. XXXIII. punished. I think that the law would bear further simplification by rejecting the distinction between theft and criminal misappropriation, which turns upon the obscure idea of possession, and corresponds to no substantial difference either in the moral guilt or the public danger of the acts defined. As, however, the whole subject was provided for at once, the elaborate discussions and many technicalities connected with the subject which have disfigured the law of England have not been transplanted into India.

I need say nothing of the aggravations of theft into robbery and extortion which are similar in England and in India.

Passing over several matters which require no remark, I come to s. 497, which punishes adultery with imprisonment up to five years. The husband only can prosecute for this offence. This is one of the strongest instances in the whole Code of a concession to native ideas. Adultery has never in England been treated as a crime, though it is an ecclesiastical offence; and when the Divorce Act of 1858 was under discussion, the suggestion that it should be so treated was decisively and perhaps finally rejected. It seems to me that, the more marriage is recognised as a state of life into which two persons enter upon equal terms, and the less the wife is looked upon as being the husband's property, the less will people be inclined to punish as a crime this most grievous and disgraceful of all private wrongs. The prosecution of a European for adultery is, I believe, almost, if not altogether, unknown in India; the remedy taken in such cases being almost invariably proceedings for a divorce.

[1] The enactments relating to defamation are remarkable. I have already referred to them as supplying an illustration of Lord Macaulay's style as a draftsman. They also are a good illustration of the temper in which the Code was drawn. On one side they are extremely severe, far more severe than the law of England. On the other they are singularly liberal, permitting to every kind of discussion considered to be advantageous to the public complete liberty from all restraint whatever. They proceed throughout on the double supposition that, on the one hand, a man's character is to be protected by

[1] Ss. 499-501.

the law as much as his person and reputation; that, on the other hand, there are many occasions on which it is necessary for the public good that the character of particular things and persons should be the subject of unrestrained discussion. The doctrine that libel is an offence because it tends to breaches of the peace had no influence at all upon the provisions of the Indian Penal Code.

As to the protection afforded by the Penal Code to private character, it will be enough to refer to the [1] definition of defamation: "Whoever by words either spoken or intended to "be read, or by signs, or by visible representations, makes "or publishes any imputation concerning any person, intend-"ing to harm, or knowing or having reason to believe that "such imputation will harm, the reputation of such person, "is said, except in the cases hereinafter excepted, to defame "that person." By s. 500, whoever defames another is liable to be imprisoned for two years. This definition goes infinitely beyond the law of England, for it applies to words as well as to writings, and the explanation already quoted, while in words it narrows it, really sets its extent in the most striking colours. "No imputation is said to harm a person's reputation unless "that imputation directly or indirectly, in the estimation of "others, lowers the moral or intellectual character of that "person, or lowers the character of that person in respect of "his caste or calling, or lowers the credit of that person, or "causes it to be believed that the body of that person is in "a loathsome state, or in a state generally considered as "disgraceful."

If strictly carried out, this would subject a man to two years' imprisonment for telling his wife that he considered someone whom they had met at dinner no better than a fool, and they would subject to the same punishment every lady who indulged in the least morsel of scandal tending to lower the moral character of any person of her acquaintance. No one of the ten exceptions would have any application to such a case. They are:—(1) Imputations both true and such that their publication is for the public good; (2) opinions as to the public conduct of public servants; (3) imputations on

[1] S. 499.

CH. XXXIII. the conduct of any person as to public questions; (4) true reports of legal proceedings; (5) criticisms made in good faith on legal proceedings and the conduct of those concerned in them; (6) criticisms on public performances, or matters submitted to public criticism; (7) answers by an inferior to a superior; (8) accusations made to a superior in good faith; (9) imputations made in good faith for the protection of the character of the defamer; (10) cautions given in good faith to a party interested, for his protection or the public good. None of these exceptions protect a man who says carelessly, "She is a silly woman," "He is a pompous old fool."

Practically, I do not think these sections have had much effect. Conversation in India is certainly not more insipid, as far as my experience goes, than in other parts of the world, and people talk scandal much as they do elsewhere.

The last [1] chapter but one of the Penal Code is extremely curious. It is headed "Of Criminal Intimidation, Insult, "and Annoyance." It fills up what no doubt was till lately a noticeable gap in the law of England—the absence of any provision for the punishment of threats of injury as distinguished from actual injuries. This gap is filled up in the most complete way by s. 503, which defines criminal intimidation as threatening another with any injury to his person, reputation, or property, or to the person or reputation of any one in whom he is interested, with intent to cause alarm to the person threatened, or to cause him to do any act which he is not legally bound to do, or to omit any act which he is legally entitled to do. The [2] offence is punishable with two years' imprisonment, or, if the threat is to cause death or grievous hurt, and in some other instances, with imprisonment up to seven years. This provision might be carried to great lengths. It has been copied or imitated to a certain extent in the "Conspiracy and Protection of "Property Act, 1875" (38 & 39 Vic. c. 86, s. 7), which punishes every person who intimidates any other person with a view to compel him to abstain from doing or to do any act which the person intimidated has a legal right to do or abstain from doing. The real meaning of this enactment

[1] Chapter xxii. ss. 503-510.

[2] S. 506.

was to prevent workmen on strike from forcing others to join them by annoying them, but in deference to a rather silly cry against "class legislation"—silly, because the whole act obviously refers to workmen as a class—the section was expressed in such terms that, if a brother told his sister that if she married a man whom he did not like they would never speak to her again, he would probably be within the act.

Section 508 is perhaps the most singular article in the whole of the Indian Penal Code. It punishes with imprisonment up to a year every one who tries to intimidate another by inducing him to believe that by some act of the offender he will become an object of divine displeasure unless he acts as the offender wishes. The practice at which this section is levelled is that of "sitting dhurna," the nature of which is that the person who "sits dhurna" sits outside his enemy's door till he, the sitter, is starved to death, the result of which is supposed to be to involve a curse upon the hard-hearted enemy. A similar practice is described in Beaufort's *Digest*—I know not whether it still exists or not—as prevailing amongst the Brahmins. They used to injure themselves in various ways, in order to bring on their enemies the guilt of having injured a Brahmin. [1] "The devices occasionally put in "practice under such circumstances by these Brahmins are—"lacerating their own bodies either more or less slightly with "knives or razors; threatening to swallow, or sometimes "actually swallowing, poison or some powder they declare to "be such; or constructing a circular inclosure called a kurh, "in which they raise a pile of wood or other combustibles, "and betaking themselves to fasting, real or pretended, place "within the area of the kurh an old woman with a view to "sacrifice her by setting fire to the kurh on the approach of "any person to serve them with any process, or to exercise "coercion over them on the part of Government or its "delegates."

Such are the provisions of the Indian Penal Code. Since its enactment it has been substantially the only body of criminal law in force in India, though a few other statutes

[1] Beaufort, part ii. p. 780.

CH. XXXIII. contain penal provisions on various special subjects. It has superseded the old Mohammedan law; the regulations which qualified it; the Bombay Code; the Punjab Code; various other orders applicable to non-regulation districts in different parts of India; and the criminal law of England as administered in the Presidency towns, and to Europeans in other parts of the country by the old Supreme Courts.

I have already expressed my opinion that the Indian Penal Code has been triumphantly successful. The rigorous administration of justice of which it forms an essential part has beaten down crime throughout the whole of India to such an extent that the greater part of that vast country would compare favourably, as far as the absence of crime goes, with any part of the United Kingdom except, perhaps, Ireland, in quiet times and apart from political and agrarian offences. Apart from this it has met with another kind of success. Till I had been in India I could not have believed it to be possible that so extensive a body of law could be made so generally known to all whom it concerned in its minutest details. I do not believe that any English lawyer or judge has anything like so accurate and comprehensive and distinct a knowledge of the criminal law of England as average Indian civilians have of the Penal Code. It is hardly an exaggeration to say that they know it by heart. Nor has all the ingenuity of commentators been able to introduce any serious difficulty into the subject. After twenty years' use it is still true that any one who wants to know what the criminal law of India is has only to read the Penal Code with a common use of memory and attention.

One further remark concludes what I have to say on the subject. Speaking with singularly little qualification, the Penal Code is simply the law of England freed from technicalities, and systematically arranged according to principles of arrangement so simple and obvious that they cannot fail to suggest themselves to any one who considers the subject. The defects of the Code certainly lie on the side rather of excess than of defect. Yet the system from which it was adapted was originally crude and defective in the highest conceivable degree, consisting of little more than a few undefined names for common offences. The history of its gradual development

I have related at length and in detail. The Indian Penal Code seems to me to supply a demonstration of the extraordinary fulness, richness, and completeness of the system from which it was framed. The adaptation of the system to the wants of two countries, so dissimilar in all ways as England and the collection of nations and races which are included under the name of India, is also a proof that the resemblances between men are far greater than their differences.

From the Penal Code I turn to the Code of Criminal Procedure, by which the Penal Code is enforced. I have already described the principal steps by which courts of justice, more or less modelled upon those of England, were introduced into India. I have, however, mentioned only the principal and leading points in what was in reality a long and elaborate process. All through the period of the Company's existence, knowledge as to the proper mode of administering justice amongst the natives was being carefully and very gradually acquired by experience. Innumerable experiments were tried with various degrees of success, and a great deal of detailed legislation took place in consequence. To go into all these matters would require a separate work.

The system established throughout India was not, and to this day is not, entirely uniform, though it has a strong tendency to become uniform. The principal difference was between what were called the regulation and the non-regulation systems. This was popularly supposed to be equivalent to a distinction between technicality and its absence, strict propriety and rough efficiency. As far as I could learn or judge, these notions were as delusive and ill-founded as somewhat similar notions derived from the supposed opposition between law and equity. The great difference between the [1] regulation and non-regulation systems was, that the

[1] The regulation provinces were those in which the Bengal, Madras, or Bombay regulations were, and to some extent still are, in force, viz. Bengal, the North-West Provinces, Madras, and Bombay. There are parts, however, of each of these provinces into which the regulations have never been introduced. The non-regulation provinces were those into which the regulations never were introduced, viz. the Punjab, Oudh, the Central Provinces, and Burmah. I think Sindh was also a non-regulation province. I speak in the past tense, because the term has really been obsolete since a single legislature

CH. XXXIII. non-regulation system was the cheaper of the two, and required fewer officers. In the regulation districts there were separate sessions judges. In the non-regulation provinces the commissioners, who had also important executive duties, acted also as sessions judges, and the deputy-commissioners, who answered to the magistrates of the district in regulation provinces, had a greater amount of judicial power. To some small extent this difference still exists, but it has been almost entirely removed.

When the Penal Code was passed into law it was felt that a Code of Criminal Procedure would be a natural, not to say necessary, addition to it. Such a Code was accordingly prepared and passed into law as Act XXV. of 1861. It brought together a large part of the laws and regulations then in force, more or less in the manner of an English consolidation act; but it was incomplete, and was also obscure and confused in its arrangement. During my tenure of office as Legal Member of Council, this Code was re-drawn, re-arranged, and made to include a considerable number of subjects which, up to that time, had been omitted from it or provided for by other enactments. The new Code became law as Act X. of 1872. The only considerable omission from it of which I am aware was that it did not apply to the procedure of the High Courts. In the present year (1882) a third edition of the Code of Criminal Procedure has become law as Act X. of 1882. It is to come into force on the 1st of January, 1883. It differs from the act of 1872 principally in the circumstance that it does apply to the High Courts as well as the other criminal courts in India, and that [1] certain alterations have been made in the arrangement of the act of 1872, besides some few alterations in its substance.

The first point necessary to be understood with respect to Indian criminal procedure in the present day is the territorial distribution of the country. British India is composed

was provided for all India, first in 1833, and more effectually in 1861. The distinguishing mark of a non-regulation province or district is the use of the name "Deputy-Commissioner" for "Magistrate of the District."

[1] I do not consider these alterations as improvements. One or two of them are noticed below.

of [1] ten provinces under separate local Governments. In each of four of these—Bengal, Madras, Bombay, and the North-West Provinces—there is a High Court, the High Courts being situated at Calcutta, Madras, Bombay, and Allahabad (whither it was removed from Agra), respectively. In the Punjab there is a Chief Court. In Burmah, the Recorder of Rangoon is, for some purposes, the High Court, and the Judicial Commissioner occupies the same position for other purposes. In the other provinces Judicial Commissioners, or other officers, discharge similar functions. [2] Each province is subdivided into sessions divisions, in each of which there is at least one sessions judge. There may be additional sessions judges, joint sessions judges, and assistant sessions judges, where the state of business requires it. The sessions division must consist of one or more districts (the old zillahs), and they may or may not be subdivided into subdivisions. [3] In each district there is a staff of magistrates, the principal magistrate being called the district magistrate. All magistrates are divided into three classes. The Governments have power to vary and alter the limits of these districts and divisions as they think proper, and also to vary the ordinary duties of the magistrates. Each of these has jurisdiction, speaking generally, over the district to which he belongs, but [4] elaborate precautions are taken to prevent any inconvenience which might arise from this rule. These precautions are adapted to a great extent from those which have been taken in England for the purpose of getting rid of the difficulties connected with the law of venue. The relation in which these courts stand to each other will appear from the

[1] The Provinces are as follows :—

1. Madras 2. Bombay	Under Governors.
3. Bengal 4. North-West Provinces (with Oudh) 5. Punjab	Under Lieutenant-Governors.
6. Central Provinces 7. Burmah 8. Scinde 9. Assam	Under Chief Commissioners.
10. Coorg	Under a Commissioner.

I believe there are some other Chief Commissionerships, smaller and of less importance—*e.g.* at Ajmere.

[2] C.C.P. ss. 7 and 9. [3] C.C.P. ss. 10-16. [4] C.C.P. ss. 177-190.

CH. XXXIII. account given of the proceedings in the cases which come before them; but before entering upon that subject it is necessary to explain a matter which is not included in the Code of Criminal Procedure, because it is settled by Act of Parliament. This is the constitution of the High Courts. These courts were established by the High Courts Act (24 & 25 Vic. c. 104), passed in 1861. This act abolished the Supreme Courts and the Sudder Courts already described, and substituted for them the High Courts. They are composed partly of English barristers and partly of civilians and pleaders. They are courts of appeal from all the civil and criminal courts under their jurisdiction, besides exercising original jurisdiction, both civil and criminal, within the limits in which such jurisdiction was formerly exercised by the Supreme Courts. Three High Courts for Calcutta, Madras, and Bombay replaced the Supreme and Sudder Courts previously established in those cities respectively, with original jurisdiction within the limits of the three Presidency towns. A fourth High Court was established at Agra (it was soon afterwards removed to Allahabad) for the North-West Provinces. The High Courts preserved all the powers which had been conferred upon the Supreme Courts, and though the Penal Code applied within the limits of their local original jurisdiction and to European British subjects throughout India, the English procedure was still maintained in respect of them, subject to some modifications provided by certain Indian acts. Under the new Code of Criminal Procedure, each of the Presidency towns forms a district, and each of the three High Courts in them is the Sessions Court for that district. The High Court of Allahabad is not a court of sessions, but has, like the other High Courts, jurisdiction over European British subjects within its jurisdiction to the extent to be hereafter mentioned.

There are many parts of India over which the authority of these courts does not extend, but courts which for many purposes have a similar character are established by the legislative authority of the Government of India in each of the provinces. Thus in the Punjab there is a Chief Court. In the other provinces there are Judicial Commissioners.

All these High and Chief Courts exercise functions, in the administration of both civil and criminal justice, to which we have nothing analogous in England. Besides the powers of appeal and reference to be described hereafter, which are exercised according to legal rules, and generally upon the application of parties interested, they have a power of general superintendence and inspection over the inferior courts which is possessed by no authority in England over any court whatever. Every act of every court in India is elaborately recorded in writing, and a system is established by which all judicial officers send up at fixed periods returns to their superiors, showing precisely how they have been employed during the past period (generally, I believe, a month); how many cases they have tried and with what results; and a variety of other matters. At all the High Courts, and courts discharging the functions of a High Court, are officers whose business it is to examine these returns and to bring to the notice of the judge who has to discharge the duty of superintendence anything unusual or which appears to require notice. The judge of the High or Chief Court thereupon causes a letter to be written to the judge of the inferior court calling for explanations. For instance, if too small a number of cases seems to have been disposed of, the reason will be asked, and the reply may probably be that some of them were unusually long or difficult.

The check on judicial neglect or misbehaviour, which is secured in England by the interest taken by the public in the administration of justice and by the comments of the Press, is supplied in India partly by the power of appeal in the hands of the parties, and partly by the powers of revision vested in the High Courts.

I now return to the powers of the courts.

[1] The High Courts may try any case and pass any sentence authorised by law. The sessions judges, and additional and joint sessions judges may do the same, but if they pass sentence of death it is subject to confirmation by the High Court. The assistant sessions judge may try any case and pass any sentence up to seven years' imprisonment, but his

[1] C.C.P. ss. 29 and 31.

CH. XXXIII. sentences require the confirmation of the sessions judge if they exceed three years' imprisonment.

[1] The Courts of Magistrates may try those cases only which they are authorised to try by a schedule annexed to the Code of Criminal Procedure which goes through every section of the Penal Code, stating with respect to every one whether persons accused of it may be arrested or not without warrant, whether they are entitled to be bailed, and by what courts they may be tried,—a very laborious, I will not say a needlessly laborious, way of giving the information. With regard to offences under any law other than the Penal Code, it is provided that magistrates of the first class are not to try offences punishable with imprisonment for more than seven years, second-class magistrates are not to try offences punishable with imprisonment for more than three years, and third-class magistrates are not to try offences punishable with imprisonment for more than one year. If it is added that magistrates cannot try offences punishable with death or penal servitude, this rule indicates pretty fairly, though it does not describe with complete accuracy, the nature of the provisions of the schedule as to offences under the Penal Code. The magistrates, however, are not permitted to pass the maximum sentences authorised by the Penal Code for the offences which they are allowed to try. [2] They are restricted as follows: First-class magistrates may sentence up to two years' imprisonment, a fine of R1,000, or whipping. Second-class magistrates to imprisonment up to six months, and fine up to R200, and (if specially authorised) whipping. Third-class magistrates to imprisonment up to one month, and fine up to R50. [3] The Deputy Commissioners in the non-regulation provinces may be authorised to try all offences not capital, and to sentence up to seven years' imprisonment.

Apart from the differences in their judicial powers, the magistrates of the three classes mentioned possess very different powers in respect of the apprehension of offenders and the various steps to be taken in preparing cases for trial. These powers are scheduled in a characteristically elaborate manner. A magistrate of the third class has eleven ordinary

[1] C.C.P. s. 29. [2] C.C.P. s. 32. [3] C.C.P. ss. 30 and 34.

powers. A magistrate of the second class has all these eleven and one more. A magistrate of the first class has all the twelve powers of a magistrate of the second class, and nine additional powers. A subdivisional magistrate has the twenty-one powers of a first-class magistrate, and thirteen others. A district magistrate has the thirty-four powers of a subdivisional magistrate, and ten more of his own, making forty-four.

In addition to these, a magistrate of the first class may be invested with twelve more powers by the local government and six by the district magistrate. A magistrate of the second class may be invested with eight powers by the local government and five by the district magistrate. A magistrate of the third class may be invested with six powers by the local government and five by the district magistrate, and a subdivisional magistrate may be invested by the local government with one additional power. The minute precision of all this seems almost grotesque; but in truth it is of the greatest importance to define with the utmost precision the powers of men many of whom are beginners and are learning by practice the details of a system the importance of which is equalled only by its elaboration. An instance or two of these powers will illustrate this. No magistrate under the first class can bind a man over to keep the peace. None but the magistrate of the district can issue a search-warrant directed to the postal or telegraph authorities.

Such are the Courts and Officers by whom the administration of criminal justice in India is managed. I proceed to describe the manner in which offenders are brought to justice.

The right to prosecute for criminal offences is not, properly speaking, left in India, as it is in England, in the hands of private persons. A person who wishes to prosecute another may complain to a magistrate, but there is no body like a grand jury before which he can send up a bill, and if he does complain and his complaint is admitted [1] he is not entitled without the magistrate's permission, to conduct the prosecution. The magistrate may appoint any one he pleases,

[1] C.C.P. ss. 492-495.

CH. XXXIII. except a police officer under a certain rank, to act as counsel for the Crown, and the Governor-General in Council and local governments may appoint public prosecutors to act in such districts and cases as they think proper. All cases tried at a court of sessions must be conducted by a public prosecutor, and if a private prosecutor instructs a pleader, the pleader must act under the direction of the public prosecutor. The public prosecutor has, however, no other duties than those of an ordinary counsel for the Crown. He has nothing to do with getting up the case.

Public prosecutors were not mentioned in the Code of 1861. They were mentioned, but no more, in the Code of 1872. The powers given to them in the Code of 1882 might, I should suppose, be liable to abuse, for it is easy to conceive cases in which it would not be the obvious interest of the Government to prosecute vigorously. Suppose, *e.g.*, that witnesses on whose testimony a person had been convicted, say of murder, were prosecuted for giving false evidence.

[1] There are some cases in which a prosecution cannot be instituted without previous sanction. Thus, offences against public servants cannot be prosecuted without the sanction of the public servant concerned or his superior officer; false evidence (in many cases) without the sanction of the court before which it is given; offences against the State without the sanction of the Governor-General in Council or the local government; charges against judges, and public servants as such, without the sanction of the government to which they are subordinate; and cases of breach of contract, defamation, or adultery, except upon the complaint of the injured party.

The only matter connected with the administration of criminal justice not dealt with in the Code of Criminal Procedure is the organisation of the police. This was omitted from the Code of 1872 from the fear of making it too cumbersome, and the same view appears to have been taken in 1882. It may be stated generally, however, that the whole or nearly the whole of India is now divided into police districts, in each of which is a station under the charge of an inferior

[1] C.C.P. s. 195.

officer, the general arrangements of the system resembling in most respects those of the English police. The superior officers of police are not part of the staff of the magistrates of the districts. They form a separate branch of the service, and are in many cases military officers.

The smallness of the number of the European magistrates makes the police more important and relatively far more powerful in India than they are in England, and I was led by many circumstances to the opinion that no part of the institutions by which India is governed required more careful watching in order to prevent what is designed for the protection of the people from becoming a means of petty oppression. The Code of Criminal Procedure is full of provisions intended to guard against this and at the same time to make the police efficient for their purpose.

There are four separate steps, each of which may form the commencement of criminal proceedings. [1] They are—(1) by arrest without warrant; (2) a police investigation; (3) a complaint before a magistrate which may result in a summons or a warrant; (4) the magistrate may also proceed upon his own knowledge or suspicion that an offence has been committed.

The schedule, to which I have already referred, states with respect to every offence against the Penal Code whether or not the offender may be arrested without warrant. The offences for which a person may be arrested without warrant are called by the somewhat ill-chosen name of cognizable offences. [2] A police constable may arrest without warrant any person who has been concerned, or whom he suspects on reasonable grounds of having been concerned, in a cognizable offence, and some other persons. [3] A private person may arrest without warrant any one who in his view commits a cognizable offence which is also not bailable. [4] As some offences are cognizable and also bailable, this seems likely to introduce some confusion. Practically, however, such arrests would be made only in cases of gross outrages against person or property.

[1] C.C.P. s. 191, c. [2] C.C.P. s. 54. [3] C.C.P. s. 59.
[4] *E.g.* offences against I.P.C. s. 269.

Ch. XXXIII.

[1] A magistrate may arrest for any offence committed in his presence, or he may direct such arrest to be made in his presence. [2] He may take the same course as to any person against whom he might issue a warrant. Every particular connected with this subject is provided for with the utmost minuteness in a long [3] series of sections. Perhaps [4] the most important of them provides that no police officer shall detain any person in custody for more than twenty-four hours before taking him before a magistrate.

The second way in which proceedings may begin is by a police investigation. [5] This process is unknown in England. It is not altogether unlike part of the French procedure, but it is still more like what would exist in England if the course usually taken in fact by the police were to be taken under a legal sanction, the police being invested by law with special powers to take evidence for their own information and guidance. Every step to be taken by the police in regard to investigations is laid down with the most minute detail in the sections of the Code of Criminal Procedure last referred to. It is impossible to abridge, and it would be tedious to extract them. The general effect of them is as follows: The officer in charge of a station may on his own responsibility investigate cognizable cases, but not non-cognizable cases unless by the order of a magistrate of the first or second class. The investigation may be made when he has reason to suspect that an offence has been committed. The officer who makes it has power to require the attendance of witnesses and to question them, and they are bound to answer him truly, which in case of refusal or falsehood brings them under the provisions of the Penal Code already referred to. The police are to hold out no inducements to suspected persons to confess, but are not to [6] "prevent by any caution or otherwise any "person from making any statement he may be disposed to "make of his own free will." The police may also make searches.

The abuse of these powers is guarded against most elaborately. When an investigation is begun the officer who

[1] C.C.P. s. 64. [2] C.C.P. s. 65. [3] C.C.P. ss. 54-67.
[4] C.C.P. s. 61. [5] C.C.P. ss. 154-172. [6] S. 163.

undertakes it is to "forthwith send a report of the same to "a magistrate." He is to enter in a diary every step he takes, and a note of all the information he receives, [1] but such notes are in no case to be signed by the informant or used as evidence, their object being to enable the magistrate and the superior officers of police to check the proceedings of the police constables. [2] If any person makes a confession, a magistrate not being an officer of police may record it. CH. XXXIII.

[3] If the officer in charge of the police station thinks there is sufficient evidence, he may take the accused person into custody (if he has not been previously arrested) and bring him before a magistrate. [4] If he has been already arrested, and if upon the investigation it appears to the police officer that there is not sufficient evidence to forward him to a magistrate, the police officer may discharge him on bail, to appear before the magistrate when required.

[5] A person may also be brought before a magistrate upon a complaint made which answers to an information in England. Upon such a complaint a summons or a warrant may issue, according to the provisions of the schedule of offences, which particularly prescribes a warrant in more serious and a summons in less serious cases. The magistrate however is never bound to issue a warrant if he thinks a summons will be sufficient. [6] If a person against whom a warrant has been issued absconds, the magistrate may issue a proclamation requiring him to come in within thirty days, failing which his property may be attached.

When by any of these means the prisoner is brought before the magistrate, the magistrate proceeds to hear evidence.

Most careful provisions are contained in the Code on the manner in which this is to be done in all inquiries and trials. They differ, in some particulars which I need not notice, according to the rank of the judge or magistrate and the character of the court, but, speaking generally, [7] they provide that in all trials and inquiries the judge or magistrate shall take down with his own hand the evidence of every

[1] S. 162. [2] S. 164. [3] S. 170. [4] S. 169.
[5] C.C.P. ss. 200-205. [6] C.C.P. ss. 87-89. [7] C.C.P. ss. 353-365.

CH. XXXIII. witness in the form of a narrative, and shall sign it when taken down, and that the evidence so taken down shall form part of the record. If the magistrate or judge does not take down the evidence in his own hand (which usually happens if it is not given in his own language), it must be taken down in his presence and hearing, and he must, as the evidence is given, make a memorandum of the substance of it. The evidence is also to be read over to the witness in a language which he understands, and if he wishes to make any correction, the judge may either correct it accordingly or note the fact that the witness desired to correct it. [1] The judge is also to make such remarks as he thinks fit as to the demeanour of the witness.

I have often heard officers complain of the stiffness of the Code of Criminal Procedure and of its not being suitable to the purposes of rough and wild districts; and in such cases I have invariably made the following remarks,—first that the complainants, on being asked which parts of the Code they objected to, always referred to the provisions as to taking evidence in their own hands and signing it; next that these complaints were usually made by the less energetic officers. [2] In former times the evidence of witnesses in criminal and other cases was not taken by magistrates, though it was taken in their presence. The magistrate might hear what the witness said, but three or four *mohurrirs* (native clerks) would take down simultaneously the evidence of as many witnesses, and the notes of the *mohurrirs* put together made up the record. Of course this saved the magistrates infinite trouble, and enabled them to get through an immense number of trials, but it was practically a denial of justice. A careful record of the evidence by the person responsible for acting upon it is an absolutely indispensable security for the justice of the decision, and it seems to me that if a trial takes place in a wild district, and amongst rough, uncivilized people, the necessity for such a record is greater than it would be under other circumstances, for the chance of injustice is greater.

[1] C.C.P. s. 363.
[2] There is a curious and vivid account of this in Sir John Shore's *Notes*.

At all inquiries or trials [1] "for the purpose of enabling the "accused to explain any circumstances appearing in the "evidence against him, the court may at any stage of the "inquiry or trial, without previously warning the accused," question him. The court must, "for the purpose aforesaid, "question him generally on the case after the witnesses have "been examined." [2] The examination must (except in the High Courts and the Chief Court of the Punjab) be recorded in question and answer, and read over to the accused, who may explain or add to his answers. His examination is to be signed by the magistrate or judge, who, if he does not actually record the examination, is at all events to take a memorandum of it as it proceeds.

The words specifying the purpose for which questions are to be asked were not in the Code of 1872, which authorised the examination of the accused without assigning any reason for it. Perhaps the expression was introduced in the Code of 1882 in order to soften what many people consider a harsh proceeding. For my own part I regret the alteration. It will either be inoperative or most embarrassing, and it looks like an apology for what does not require one. It is, however, hypocritical, for the Code contains no provision as to what is to happen if the questioning does not conform to the directions of the Code, and it specifically enacts that "the "court and jury (if any) may draw such inference from" the refusal of the accused to answer or from his answers as they please. Besides, in practice, every question any one could want to ask might be justified by the terms of the section; *e.g.*—"The witnesses say they saw you at this place. "Were you there or not, and, if not, where were you?" The words thus make hardly any difference.

The effect of the evidence given before the magistrate may differ according to the nature of the offence imputed.

The case may be one which the magistrate is competent to dispose of himself, and which he thinks would be sufficiently punished on conviction by the exercise of his judicial powers. In this event he may proceed to try the case. The trial of

[1] C.C.P. s. 342. [2] C.C.P. s. 364.

CH. XXXIII. summons cases and warrant cases is provided for in [1] separate chapters of the Code, but the only differences between them are, that a formal charge is made in warrant cases and not in summons cases, and that in summons cases but not in warrant cases if the magistrate regards the charge as frivolous and vexatious he has power, not only to dismiss it, but to award compensation up to R50 against the person by whom it is made. The trial itself takes the same course as an English trial. The case is opened, the witnesses for the prosecution are heard, the prisoner examined as above mentioned. He is then heard in his defence. His witnesses are called, and the prosecutor replies, after which the magistrate acquits or convicts and sentences.

In [2] some cases of minor importance the magistrate of the district is allowed to try in what is called a summary way. In such cases the evidence is not recorded, but a short form is filled up, similar to those in use in small cases in Ireland. Sentence may not be passed of more than three months' imprisonment, accompanied, if the law permits it, by fine or whipping. [3] If the sentence is simple, there is no appeal. If it is compound, there is an appeal, and, in order that there may be something to appeal from, a judgment, "embodying "the substance of the evidence" and also certain particulars specified, must in such cases be recorded before sentence is passed.

[4] The magistrate, however, may not be competent to try the charge brought against the accused, or may consider that the case ought to be sent for trial before the court of sessions. If so, he hears the evidence on both sides, examines the accused, and either dismisses him or commits him for trial.

I pass over many details provided for in the Code as to the manner in which the prisoner's witnesses are to be summoned, and other matters of no general interest. The only point which I need notice is that in India there are no grand juries. There used to be such bodies in the High Courts till 1865, when they were abolished by an act which was introduced by Sir Henry Maine. The committing magistrate is now the

[1] Summons cases, ch. xx. ss. 241-250; warrant cases, ch. xxi. ss. 251-259.
[2] C.C.P. ss. 260-265. [3] C.C.P. s. 264. [4] C.C.P. ss. 206-220.

accuser, and it is his duty to draw and forward the charge, which answers to our indictment. [1] The law relating to charges is laid down at considerable length in the Code. Its provisions are intended to provide that the charge shall give the accused full notice of the offence charged against him, but that the only result of any defect in the charge shall be an amendment in terms as to delay, or a new trial if the accused seems to have been misled. CH. XXXIII.

Various matters as to the joinder of different charges, variances between the charge and the evidence, and the charging of more persons than one, are dealt with, which I pass over as too detailed to be here noticed. The following is a specimen taken from the schedule of forms of an Indian indictment for high treason:—

(*a*) "I" (name and office of magistrate) "hereby charge you" (name of accused person) "as follows—

(*b*) "That you on or about the day of , at , waged war against Her Majesty the Queen, Empress of India, and thereby committed an offence punishable under Section 121 of the Indian Penal Code, and within the cognizance of the Court of Session.

(*c*) "And I hereby direct you to be tried by the said Court on the said charge."

When committed, the prisoner is tried by the High Court if the committal is by a Presidency magistrate, or by the Court of Session as the case may be. The trial must be either by jury or with the aid of assessors.

Much the commoner case of the two is trial with the aid of assessors. I am unable to say how matters stand at present, but when I left India in 1872 trial by jury was unknown, except in the Presidency towns, in a few districts, principally in Bengal, in which it applied only to minor cases, and in the case of European British subjects. The local governments may introduce it in such districts and with regard to such classes of cases as they think fit. [2] In both cases the trial follows the same course as in England. The prisoner pleads guilty or not guilty, or if he refuses to plead

[1] Ss. 221-240. I drew these sections in the Code of 1872. They are re-enacted with little alteration.

[2] C.C.P. ss. 266-307.

CH. XXXIII. the court proceeds without a plea—a more rational course than entering a plea of not guilty. [1] He may also, I suppose, plead that he has been previously convicted or acquitted, in terms similar to those in force in England as to pleas of *autrefois acquit* and *convict.* The prosecutor opens his case and calls his witnesses. The prisoner is examined. If he does not call witnesses, the prosecutor sums up. The prisoner makes his defence and calls his witnesses, and the prosecutor replies. If there is a jury the judge sums up. If there are assessors he may sum up, and must require the opinion of the assessors, which is recorded, but does not bind the judge. There are two assessors.

[2] The number of the jury is in the High Courts nine, and in the Courts of Session where there are juries, three, five, seven, or nine, as the local government may direct. Eight peremptory challenges are allowed to both the prosecutor and the prisoner, and any number for cause. [3] The functions of the judge and jury respectively are the same as in England, but are expressed with more emphasis than would be considered right in England. "It is the duty of the jury "(a) to decide which view of the facts is true, and then to "return the verdict which under such view ought, according "to the direction of the judge, to be returned."

ILLUSTRATION.

A. is tried for the murder of B.

It is the duty of the judge to explain to the jury the distinction between murder and culpable homicide, and to tell them under what view of the facts A. ought to be convicted of murder, or of culpable homicide, or to be acquitted.

It is the duty of the jury to decide which view of the facts is true, and to return a verdict in accordance with the direction of the judge, whether that direction is right or wrong, and whether they do or do not agree with it.

[4] If the jury are unanimous in the High Court, their verdict must be taken. If six of them agree, and the judge agrees with the six, the judge must give judgment accordingly. If the judge disagrees with the six, or if a

[1] C.C.P. s. 403. This section seems misplaced. It is put in a chapter by itself after Execution and Pardon. There ought to be a chapter, or at least provisions, as to Pleas following the provisions as to Charges. S. 403 says that persons previously acquitted or convicted are not to be tried again, but it does not say, as it ought, how this defence is to be made.

[2] C.C.P. ss. 274-283. [3] C.C.P. s. 299. [4] C.C.P. ss. 303-305.

majority of less than six agree, the jury must be discharged. [1] If in the sessions court the judge "does not "think it necessary to express disagreement with the verdict "of the jurors, or of a majority of the jurors, he" must "give "judgment accordingly." If the judge "disagrees with the "verdict of the jurors, or of a majority of the jurors, so "completely that he thinks it necessary for the ends of "justice to submit the case to the High Court," he may do so, recording the grounds of his opinion, whether the verdict with which he disagrees is one of acquittal or conviction. The effect of such a submission is the same as that of an appeal.

The next step in the proceeding is the judgment. [2] The judgment must be written by the presiding officer of the court, either in the language of the court or in English. It must state the reasons for the decision. If the offence is capital and any sentence other than death is passed, the judgment must state the reason why sentence of death was not passed. The prisoner is to have a copy, in his own language, of the judgment, and in trials by jury in courts of session a copy of the heads of the judge's charge.

These provisions for recording the evidence given before the courts, and their reasons for their decision, are made with a view to the elaborate system of proceedings by way of appeal, which forms perhaps the most characteristic part of Indian criminal procedure.

The first proceeding of the sort is [3] confirmation. This takes place in two cases only,—namely, first, when sentence of death is passed by a sessions court, and next when an assistant sessions judge passes a sentence of more than three years' imprisonment. In the first case the sentence has to be confirmed by the High Court. In the second, by the sessions judge. The confirming authority may make further inquiry, and may either confirm or alter the sentence, or acquit the person convicted.

The [4] system of appeals, properly so called, is next to be considered. It is extremely elaborate, and applies to the

[1] C.C.P. s. 307.
[2] C.C.P. ss. 366-373.
[3] C.C.P. ss. 374-380.
[4] C.C.P. ss. 404-431.

CH. XXXIII. sentences of all the courts except the High Courts. This is best shown by the following table :—

Appeals lie from		To
Magistrates of second or third classs	=	District magistrate, or a first-class magistrate, subordinate to and authorised by him.
Assistant sessions judge, district magistrate, or first-class magistrate.	=	Court of Session.
Sessions judge, or additional or joint sessions judge	=	High Court.
Presidency magistrate	=	High Court.

The appeal, except in cases tried by jury, may be either on fact or on law. In cases tried by a jury, on law only. The local government may direct the public prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any court other than a High Court, but in all other cases the appeal is given only to a person convicted.

The Court of Appeal may reject the appeal in a summary way, if satisfied upon perusing it that there is no ground to interfere. This course is rendered necessary by the unlimited facilities given for appealing, for the appeal consists only of a petition in writing, which may, and frequently does, state no reason at all beyond some vague complaint that the sentence is wicked and unjust.

If the repeal is not thus rejected it is argued. The court may order further inquiry, and may in the case of an appeal from an acquittal confirm the acquittal, order a new trial, or convict and sentence the person acquitted. In an appeal from a conviction it may either maintain, reverse, or alter the finding and sentence or either of them, but not so as to enhance the sentence. Power to enhance was given to the Courts of Appeal in 1872.

[1] Reference and revision are proceedings confined to the High Courts. Reference is a process copied from the English procedure as to reserving cases for the Court for Crown Cases Reserved. A judge of the High Court may refer any

[1] C.C.P. ss. 432-434.

question of law to a bench of the High Court, and a Presidency magistrate may do the same.

[1] The system of revision I have already described to a certain extent. The High Court may call for the record of any case which it chooses to call for. It may go into any matter, and hear any parties, and order any further inquiry it thinks fit, and it may not only exercise upon revision all the powers of a Court of Appeal, but may [2] enhance sentences, though it may not reverse acquittals. [3] It may, however, order a commitment for trial if it thinks a case has been improperly dismissed.

[4] Besides these general powers of revision, the High Courts have power in various cases to transfer cases for trial from court to court, or to call them up for trial before themselves. The Governor-General of India in Council has a similar power, and so have district and subdivisional magistrates as regards cases which come before their subordinates.

Hitherto I have referred chiefly to proceedings against natives. A distinction however is made in the Code between proceedings against natives of India and proceedings against European British subjects. As I have already pointed out, European British subjects till the year 1872 could be prosecuted only in a High Court, except for very trivial offences. In the Code of 1872 this privilege was considerably abridged, and provisions were enacted which are in substance re-enacted by the Code of 1882. The important part of the [5] provisions in question is that charges against European British subjects can be inquired into and tried only by justices of the peace being also magistrates of the first class and European British subjects, except in the Presidency towns, where native justices of the peace may perform those duties.

European British subjects can be sentenced by magistrates competent to try them only to imprisonment up to three months and fine to a thousand rupees, or both. If a heavier sentence seems to be required, they must be tried before a sessions judge being himself a European British subject. The

[1] C.C.P. ss. 435-424. [2] C.C.P. s. 439. [3] C.C.P. s. 436.
[4] C.C.P. ss. 526-528. [5] C.C.P. ss. 443-459.

CH. XXXIII. sessions judge may try the European British subject for any offence not punishable with death or transportation for life, but he cannot sentence him to more than one year's imprisoment and fine, in reference to which it must be remembered that imprisonment is in India a far more serious punishment to a European than it is to a native, or to a European in Europe. It is probable that a year's imprisonment in India is as heavy a sentence as two years would be in England, and two years is the limit in England of the kind of imprisonment awarded here. If the sessions judge considers this an inadequate punishment, he must transfer the case to the High Court. The High Courts, the Chief Court of the Punjab, and the Recorder of Rangoon, can try European British subjects for any crime, and pass upon them any sentence sanctioned by law.

These are the principal provisions of the Code of Criminal Procedure; but I have by no means exhausted its contents. It deals with a great variety of subjects, some of which are, though others are not, closely connected with criminal proceedings. Of the former class I may mention [1] provisions as to the examination of witnesses on commission; and [2] very careful and elaborate provisions as to the cases in which irregularities shall and shall not vitiate the procedure in which they occur.

Of matters not obviously connected with criminal procedure dealt with by the Code, I may refer to [3] part iv., "Of the "Prevention of Offences." This, instead of being treated as it was in the Code of 1872 as a separate matter, is in the Code of 1882 awkwardly interposed between provisions as to summonses, warrants, and other processes to compel the appearance of suspected persons, and the powers of the police to investigate such offences. A further defect in the arrangement of this matter is that the law relating to the making of orders for the maintenance of wives and children, which ought to be put in this part as it is a mode of preventing vagrancy, or at least of preventing its consequences, is put [4] near the end of the Code, between prosecutions directed by

[1] C.C.P. ss. 503-508.
[2] C.C.P. ss. 529-538.
[3] C.C.P. ss. 106-153.
[4] C.C.P. ch. xxxvi. ss. 488-490.

certain courts in some special cases, and a chapter relating to proceedings in the nature of a Habeas Corpus. A code ought to be so arranged that it may be read through consecutively, like any other book, without any interruption in the natural order of the subject.

The contents of the part relating to the prevention of offences are highly important, though their place is needlessly altered from the one assigned to them in the Code of 1872. They comprise the following subjects: Taking security for the keeping of the peace, the dispersion of unlawful assemblies, the making of orders as to the removal of public nuisances, and the making of orders as to disputes relating to immoveable property. Of them I may observe that the [1] provisions as to the dispersion of unlawful assemblies (which were first enacted in 1872) are founded upon, and embody in express terms, the principles laid down in the charge of Chief Justice Tindal to the grand jury of Bristol, in 1832, as to the duty of soldiers in dispersing rioters. They carry the law somewhat further than it has yet been carried in England, as they expressly indemnify all persons who act in good faith under the directions of the sections in question, and forbid any prosecution of such persons except with the previous sanction of the Governor-General in Council.

[2] The provisions as to disputes about immoveable property empower magistrates to decide who as a fact is in actual possession of the subject matter of the dispute, and to make an order that he shall continue in possession until ejected in due course of law. This represents one of the old regulations, and is a power highly important, and indeed necessary, in a country where disputes as to boundaries, water-courses, the possession of land altered in its character by changes in the course of rivers, and the like, used commonly, and still do not unfrequently, lead to frays which, if allowed to continue, might degenerate into blood feuds.

These are the principal contents of the Code of Criminal Procedure. The system which it contains is far more original and more directly the result of Indian experience than the

[1] C.C.P. ss. 127-132. [2] C.C.P. ss. 145-148.

CH. XXXIII. system of criminal law embodied in the Indian Penal Code. The Penal Code, as I have already observed, is almost entirely a new version of the law of England. The Code of Criminal Procedure consists of enactments which were devised in slow detail, as occasion required, in order to meet the actual wants of a vast society, which, when English superseded native rule, was almost in a state of anarchy. In course of time it became a most elaborate, minute, and yet comprehensive system, adapted by the most anxious care and solicitude to the purposes which it was intended to fulfil. It has now been arranged and methodized, or codified, three successive times. On each occasion its scope was extended, and the last Code, the Code of 1882, is important chiefly because it extends the system to the whole of India, including the Presidency towns, thus superseding entirely the English system which had formerly prevailed there. English institutions have, no doubt, served in a general way as a model for those of India. In each there are police, the Indian being modelled on the English pattern. In each there are committing magistrates, and in each there are superior criminal courts; in each, also, there is, in certain cases, trial by jury, though in India this is a rare exception, and the trial proceeds on a different principle; but the grading of the different classes of magistrates, the extent of their judicial powers, and, above all, the minute and elaborate system by which the different courts are subordinated to each other, both in the way of discipline and in the way of appeal, and by which all are superintended in every detail of their procedure by the High Courts, is characteristically and exclusively Indian. Even the foregoing imperfect account of the system will show how true it is that the Indian civilians are, for the discharge of all their duties, judicial or otherwise, in the position of an elaborately disciplined and organized half-military body.

If it is asked how the system works in practice, I can only say that it enables a handful of unsympathetic foreigners (I am far from thinking that if they were more sympathetic they would be more efficient) to rule justly and firmly about 200,000,000 persons, of many races, languages, and creeds, and, in many parts of the country, bold, sturdy, and warlike.

In one of his many curious conversations with native scholars Mr. Monier Williams was addressed by one of them as follows: "The sahibs do not understand us or like us, but "they try to be just, and they do not fear the face of man." I believe this to be strictly true. The Penal Code, the Code of Criminal Procedure, and the institutions which they regulate, are somewhat grim presents for one people to make to another, and are little calculated to excite affection; but they are eminently well calculated to protect peaceable men and to beat down wrongdoers, to extort respect, and to enforce obedience.

Of the extremely careful adaptation of every word and line of the Code of Criminal Procedure to the purposes for which it was designed, I am able to give from my own personal knowledge somewhat important testimony. I had charge of the Code of 1872, and carried it through the Legislative Council. My own personal share in the work consisted mainly in making the first draft, and especially in devising the arrangement of the Code, presiding at the committees to which it was referred, and studying the information respecting it which was supplied by others. The Code was considered and passed according to the routine followed in the Indian Legislative Council on all occasions. In the first place, the Code, having been drawn and introduced into the Legislative Council, was published in the *Gazette* and circulated throughout India, every local government being required to have it thoroughly examined by experienced officers, and to return it to the Government of India with such observations and suggestions as they considered proper. The result of this was to produce a great amount of official criticism, embodying the experience of officers in all parts of the country, and bearing upon every, or nearly every, provision of any importance which the Code contained.

When all these suggestions were received, the Code was referred to a Committee of the Legislative Council, consisting, I think, of fourteen or fifteen members, comprising [1] men of the largest experience and highest position from every part

[1] Sir George Campbell, then Lieutenant-Governor of Bengal, Sir R. Temple and Sir J. Strachey, were three.

CH. XXXIII. of India. The committee met five days in the week, and sat usually for five hours a day. We discussed successively both the substance and the style of every section, and different members assigned for the purpose brought before the committee every criticism which had been made on every section, and all the cases which had been decided by the High Courts on the corresponding sections of the Code of 1861. These discussions were all by way of conversation round a table, in a private room. When the report was presented the Code was passed into law after some little unimportant speaking at a public meeting of the Council. This was possible because in India there are neither political parties nor popular constituencies to be considered, and hardly any reputation is to be got by making speeches. Moreover, every one is a man under authority having others under him.

The point which made an ineffaceable impression on my mind was the wonderfully minute and exact acquaintance with every detail of the system displayed by the civilian members of the committee. They knew to a nicety the history, the origin, and the object of every provision in the Code which we were recasting. Such a section, they would say, represented such a regulation or such an act. It was passed in the time of such a Governor-General in order to provide for such and such a state of things, and we must be careful to preserve its effect. To be present at, and take a part in, these discussions was an education not only in the history of British India, but in the history of laws and institutions in general. I do not believe that one act of parliament in fifty is considered with anything approaching to the care or discussed with anything approaching to the mastery of the subject with which Indian acts are considered and discussed.

CHAPTER XXXIV.

THE CODIFICATION OF THE CRIMINAL LAW.

CH. XXXIV.

I HAVE now described in full detail every part of the criminal law as it is, comparing or contrasting its provisions with the corresponding provisions of three other systems; namely, those of France, Germany, and British India. Apart from such permanent historical interest as may attach to these matters, their principal practical importance lies in the degree in which they conduce to, and prepare the way for, the permanent improvement of the law itself. The only great improvement which appears to me at once desirable and practicable is its codification, which, when fully understood, means only its reduction to an explicit systematic shape, and the removal of the technicalities and other defects by which it is disfigured.

In the study which I have bestowed upon this subject, I have frequently been led to consider the question, What is a technicality? How does it come to pass, on the one hand, that technicalities should be regarded with so much contempt, and on the other, that they should exercise such a despotic influence?

The answer is that technicalities, generally speaking, are unintended applications of rules intended to give effect to principles imperfectly understood, and that they are rigidly adhered to for fear departure from them should relax legal rules in general. The principle that when a man kills another by great personal violence criminally inflicted the crime is as great as if death were expressly intended is sound. Express it in the rule that it is murder to cause death in committing

a felony, and you get the unintended and monstrous result that it is murder to kill a man by accident in shooting at a fowl with intent to steal it. Define theft as a fraudulent taking, and though the definition, speaking generally, is a good one, all the unintended consequences about possession, which I have described at length, follow. That an indictment should state explicitly and distinctly the offence with which a prisoner is charged is an obviously true principle. Translate it into the rules about "certainty to a certain "intent in general," and it becomes the source of grotesque absurdities. In all these cases the technicalities, when once established, are adhered to, partly because they are looked upon as the outworks of the principles which they distort; partly from a perception of the truth that an inflexible adherence to established rules, even at the expense of particular hardships, is essential to the impartial administration of justice; and partly because to a certain kind of mind arbitrary and mischievous rules are pleasant in themselves. There are persons, though they are now few and not influential, to whom it is a positive pleasure to disappoint natural expectations by the application of subtle rules which hardly any one else understands. So long as the doctrines of any department of knowledge are supposed to be absolutely true, technicalities are devised and maintained by those who believe in the doctrines, and are treated as a *reductio ad absurdum* by those who deny their truth. Wider experience shows that a technicality or absurd inference from an alleged truth shows not that the proposition from which it follows is wholly untrue, but only that it is imperfectly expressed, and in this way technicalities are highly interesting. They mark the progress of knowledge in all its departments; and the possibility of dispensing with them, without parting with the valuable matters which they were intended to protect, is a good test of the clearness with which the principles are grasped, in an imperfect acquaintance with which they originated.

However this may be, the time has now unquestionably come at which it is possible to express the criminal law of this country without resorting to any technicalities whatever,

and in a compact and systematic form. That this can be done is proved by the fact that it actually has been done in the Draft Criminal Code published by the Commission of 1878-79.

I have pointed out and discussed in the course of this work the principal alterations which the Code proposed to make in the existing law, and the draft speaks for itself; and I still hope that it may become law when parliament has time to attend to the subject.

I cannot, however, more fitly conclude this work than by giving some short account of the general scope and characteristics of the proposed measure. In doing so, I shall reproduce, though with some variations and additions, part of the Report of the Commissioners. I have not thought it necessary to distinguish my extracts from it as quotations, or to mark the alterations which I have introduced. By far the greater part both of the Code and of the Report was my own composition. In order to mark the fact that for what follows in its present shape I alone am responsible, I have substituted throughout the first person singular for the first person plural employed by the commissioners.

In the first place, then, I think it expedient to make an attempt to remove certain misconceptions relating to codification which affect the judgment formed by many persons upon the possibility and the utility of the undertaking. These misconceptions seem to originate in a wrong estimate of what can be, and is proposed to be, effected by codification.

It is assumed that the object of the process is to reduce to writing the whole of the law upon a given subject in such a manner that, when the Code becomes law, every legal question which can arise upon the subject with which it deals will be provided for by its express language. When any particular attempt at codification is judged by this standard, it is easy to show that the standard is not attained.

It is also common to argue that, even if such a standard were attained, the result would not be beneficial, as it would deprive the law of its "elasticity"; by which is understood the power which the courts of justice are said to possess of adjusting the law to changing circumstances by their decisions

CH. XXXIV. on particular cases. It is said that the law of this country is in a state of continual development; that judicial decisions make it more and more precise and definite by settling questions previously undetermined; and that the result is to adjust the law to the existing habits and wants of the country. To this process it is said that codification, so far as it goes, would put an end, and that the result would be to substitute a fixed, inelastic system for one which possesses the power of adjustment to circumstances.

These observations may be answered by pointing out the object and limits of codification, and by examining the real nature of the change which codification would produce.

In the first place, it must be observed that codification means merely the reduction of the existing law to an orderly written system, freed from the needless technicalities, obscurities, and other defects which the experience of its administration has disclosed. The process must be gradual. Not only must particular branches of the law be dealt with separately, but each separate measure intended to codify any particular branch must of necessity be more or less incomplete. No one great department of law is absolutely unconnected with any other. For instance, bigamy is a crime; but, in order to know whether a person has committed bigamy, it is necessary to know whether his first marriage was valid. Thus the definition of the crime of bigamy cannot be completely understood by any one who is unacquainted with the law relating to marriage. The definition of theft, again, involves a knowledge of the law relating to property, and this connects itself with the law of contract, and many other subjects.

There are, moreover, principles underlying every branch of the law which it would be impracticable to introduce into a code dealing with a particular branch only. The principles which regulate the construction of statutes supply an illustration of this. A criminal code must of course be construed like any other act of parliament, but it would be incongruous to embody in a criminal code the general rules for the construction of statutes, even if it were considered desirable to reduce them to a definite form.

It is, however, easy to exaggerate the degree of this

incompleteness. The great leading branches of the law are to a great extent distinct from each other; and there is probably no department which is so nearly complete in itself as the criminal law. As I have shown, the experience of several foreign countries and of British India has proved that the law relating to crimes is capable of being reduced to writing in such a manner as to be highly useful. Indeed, far the larger and more important part of the criminal law of this country is already reduced to writing in statutes, and in particular the portion dealt with by the Consolidation Acts of 1861. There is no distinction in the nature of the subject between the parts of the criminal law which are written and the parts which are not written. High treason is defined by statute, and so is bribery. Why should it be impossible to define murder or theft?

The unwritten portion of the criminal law includes the three following parts: (1) Principles relating to matter of excuse and justification for acts which are *primâ facie* criminal; (2) the definitions of murder, manslaughter, assault, theft, forgery, perjury, libel, unlawful assembly, riot, and some other offences of less frequent occurrence and importance; and (3) certain parts of the law relating to procedure. To do for these parts of the criminal law what has already been done for the rest of it is no doubt a matter requiring labour and care; but when so much of the work has been already done, it seems unreasonable to doubt, either that the remaining part of the criminal law can be reduced to writing, or that when it is written down and made to form one body with the parts already written, the whole will be improved.

The objection most frequently made to codification—that it would if successful deprive the present system of its "elasticity"—has exercised considerable influence; but, when it is carefully examined, it will turn out to be entitled to no weight. The manner in which the law is at present adapted to circumstances is, first by legislation, and secondly by judicial decisions. Future legislation can of course be in no degree hampered by codification. It would, on the other hand, be much facilitated by it. The objection under consideration applies, therefore, exclusively to the effects of

CH. XXXIV. codification on the course of judicial decision. Those who consider that codification will deprive the common law of its "elasticity" appear to think that it will hamper the judges in the exercise of a discretion, which they are at present supposed to possess, in the decision of new cases as they arise.

There is some apparent force in this objection, but its importance has been altogether misunderstood. In order to appreciate the objection, it is necessary to consider the nature of the discretion which is vested in the judges.

It seems to be assumed that, when a judge is called on to deal with a new combination of circumstances, he is at liberty to decide according to his own views of justice and expediency; whereas, on the contrary, he is bound to decide in accordance with principles already established, which he can neither disregard nor alter, whether they are to no previous judicial decisions or in books of recognised authority. The consequences of this are, first, that the elasticity of the common law is much smaller than it is often supposed to be; and secondly, that so far as a code represents the effect of decided cases and established principles, it takes from the judges nothing which they possess at present.

For example, it never could be suggested that a judge in this country has any discretion at the present day in determining what ingredients constitute the crime of murder, or what principles should be applied in dealing with such a charge under any possible state of circumstances; but, as my history of it shows, the law has been brought into its present condition by a long series of judicial decisions and statements by text-writers. There is at present almost no elasticity or uncertainty about it, though the form in which it is expressed is to the last degree cumbrous and inconvenient.

In fact, the elasticity so often spoken of as a valuable quality would, if it existed, be only another name for uncertainty. The great richness of the law of England in principles and rules, embodied in judicial decisions, no doubt involves the consequence that a code adequately representing it must be elaborate and detailed; but such a code would not (except perhaps in the few cases in which the law is obscure) limit

any discretion now possessed by the judges. It would simply change the form of the rules by which they are bound.

The truth is that the expression "elasticity" is altogether misused when it is applied to English law. One great characteristic of the law of this country, at all events of its criminal law, is, that it is extremely detailed and explicit, and leaves hardly any discretion to the judges. This precise and explicit character of our law is one of its most valuable qualities, and one great advantage of codification would be that it would preserve this valuable quality by giving the result of an immense amount of experience in the shape of definite rules.

This may be shown by comparing our own law with the law of France. The criminal law of France is founded upon the *Code Pénal*, but the decisions of the courts as to the meaning of the Code do not form binding precedents; and the result is that French courts and juries can (within the limits prescribed by the words of the *Code Pénal*) decide according to their own views of justice and expediency. In the exercise of this discretion they are of course guided, though they are not bound, by previous decisions. The result is that French criminal law under the *Code Pénal* is infinitely more elastic than the criminal law of England is or ever has been, although the latter is founded on unwritten definitions and principles. For instance, [1] it is stated in a work of great authority that, after holding for twenty-seven years that to kill a man in a duel did not fall within the definition of "*meurtre*" given in the *Code Pénal*, the Court of Cassation decided in 1837 that such an act did fall within that definition. The authors of the work in question argue at great length that the earlier decisions were right and ought to be followed.

Again, the whole method of legislative expression adopted in France and England respectively shows that the French Code is far more elastic than the English law as it stands. This is not commonly understood; on the contrary, the generality of language common in continental codes raises a false impression that they are specially complete and

[1] Adolphe et Hélie, *Théorie du Code Pénal*, iii. pp. 487-489, ed. 1861.

CH. XXXIV. systematic, and that the law of England is less exact and more elastic. The very opposite is the truth. An illustration of the contrast between the English and French mode of judicial expression is to be found in the provisions which they make as to matter of justification and excuse. Take, for instance, the way in which the *Code Pénal* and the Draft Code of 1879 provide for the subjects of madness and compulsion. In the *Code Pénal* these two subjects are dealt with in a single article (64) as follows:—"Il n'y a ni crime ni délit lorsque le prévenu était en état de "demence au temps de l'action, ou lorsqu'il aura été contraint "par une force à laquelle il n'a pas pu résister." These matters were dealt with in separate sections of the Draft Code as follows:—

"SECTION 22.—INSANITY.—If it be proved that a person "who has committed an offence was at the time he committed "the offence insane, so as not to be responsible for that offence, "he shall not therefore be simply acquitted, but shall be found "not guilty on the ground of insanity.

"To establish a defence on the ground of insanity, it must "be proved that the offender was at the time when he com-"mitted the act labouring under natural imbecility or disease "of or affecting the mind, to such an extent as to be incap-"able of appreciating the nature and quality of the act or "that the act was wrong.

"A person labouring under specific delusions but in other "respects sane shall not be acquitted on the ground of in-"sanity, unless the delusions caused him to believe in the "existence of some state of things which if it existed would "justify or excuse his act: Provided that insanity before or "after the time when he committed the act, and insane "delusions though only partial, may be evidence that the "offender was at the time when he committed the act in "such a condition of mind as to entitle him to be acquitted "on the ground of insanity.

"Every one committing an offence shall be presumed to be "sane until the contrary is proved.

"SECTION 23.—COMPULSION.—Compulsion by threats of "immediate death or grievous bodily harm from a person

"actually present at the commission of the offence shall be an "excuse for the commission of any offence other than high "treason, as hereinafter defined in section 75, subsections (*a*) "(*b*) (*c*) (*d*) and (*e*), murder, piracy, offences deemed to be piracy, "attempting to murder, assisting in rape, forcible abduction, "robbery, causing grievous bodily harm, and arson: Provided "that the person under compulsion believes that such threat "will be executed: Provided also that he was not a party to "any association or conspiracy the being party to which "rendered him subject to such compulsion."

I have discussed fully the subjects of insanity and compulsion as excuses for crime, and I do not mean to return to the discussion; but, whatever may be thought of the value of these sections, it cannot, I think, be denied that they do, and that the French provisions do not, supply a definite rule for the judge and the jury in every case likely to come before them for decision.

The extreme completeness and minuteness of the English criminal law is all the more remarkable because it was in its origin, and on some particular points still is, singularly vague. Its present condition arises from the fact that it was put together slowly and bit by bit by parliament on the one hand and the judges of the superior courts on the other.

It thus represents, like the other branches of the law of England, the result of the labours of the most powerful legislature and the most authoritative body of judges known to history. In no other country in the world has a single legislature exercised without dispute and without rival the power of legislating over a compact and yet extensive nation for anything approaching to so long a period as the parliament of England. In no other country has a small number of judges exercised over a country anything like so extensive and compact the undisputed power of interpreting written and declaring unwritten law, in a manner generally recognized as of conclusive authority.

Any code which was not founded upon and did not recognize these characteristics of the law of England would give up one of its most valuable characteristics. The generality of language which is characteristic of the foreign codes would be

CH. XXXIV. wholly unsuited to our own country, and it would necessitate the re-opening and fresh decision of a great number of points which existing decisions have settled. There is no doubt something attractive at first sight in broad and apparently plain enactments. Further acquaintance with the matter shows that such enactments are in reality nothing but simple and therefore deceptive descriptions of intricate subjects. If an attempt, for instance, is made to dispose in a few words of such a subject as homicide or madness, the result is, either a vague phrase, such as, "murder is unlawful killing with "malice aforethought," which has to be made the subject of all sorts of intricate explanations, and the source of endless technicalities, or else a rule like "l'homicide "commis volontairement est qualifié meurtre." This rule has no doubt the merit of being short and, if "volon-"tairement" means "intentionally," clear, but is quite inadequate, and if it is acted upon produces bad results. Homicide, considered as a crime, does not admit of a short definition. The subject must be carefully thought out, and all the questions which it raises must be explicitly and carefully dealt with, before the matter can be satisfactorily disposed of. There is, however, abundant proof that when subjects are thus carefully thought out the definitions of crimes may be made quite complete and absolutely perspicuous. To take a single instance, I may refer to the definition of bribery in the Corrupt Practices Act of 1854 (17 & 18 Vic. c. 102, s. 2). It consists of five principal heads,—namely, firstly, paying money for votes; secondly, giving offices for votes; thirdly, doing either of these things with intent to get any person, not to vote for, but to procure the return of, any member to parliament; fourthly, acting upon any such consideration; and lastly, paying money with intent that it shall be employed in any of these ways. [1] Each of

[1] I give a single illustration. The first head of the definition of bribery is as follows:—"Every person who shall, directly or indirectly, by himself, or by "any other person on his behalf, give, lend, or agree to give or lend, or shall "offer, promise, or promise to procure or to endeavour to procure, any money "or valuable consideration to or for any voter, or to or for any person on "behalf of any voter, or to or for any other person in order to induce any "voter to vote, or refrain from voting, or shall corruptly do any such act as "aforesaid, on account of such voter having voted, or refrained from voting,

these five general heads is carefully elaborated, so that every additional word strikes at some conduct not exactly covered by any other phrase in the whole section, till at last the whole taken collectively, embraces every conceivable case of, what would popularly be described as bribery. After being in force for nearly thirty years, one question only, and that a small one, has arisen as to what acts do or do not fall within the statute. It must, on the other hand, be admitted that such definitions are not pleasant reading, nor can the public at large be expected to follow all their details. As, however, laws are intended mainly for the actual administration of justice, I emphatically prefer our own way of drawing them up.

This particularity is not always necessary. Where precise and definite propositions are to be conveyed, elaboration and detail in the structure of a code are required; but where the principles of law admit of any matter being left to the discretion of the judge or jury, as the case may be, this discretion can be preserved in a code by the use of general language. An illustration is supplied by the Extradition Act (33 & 34 Vic. c. 52, s. 3), which enacts amongst other things that "a fugitive criminal shall not be surrendered if "the offence in respect of which his surrender is demanded "is one of a political character." As I have shown, the employment of the expression "an offence of a political "character" might, under circumstances easy to imagine, impose upon the tribunal the necessity of deciding questions of extreme delicacy and difficulty, towards the decision of which the mere words of the legislature would contribute little or nothing. Another illustration may be found in section 39 of 33 & 34 Vic. c. 9, where a crime is referred to as "of the character known as agrarian." Numerous instances occur in the Draft Code in which such general language has been designedly and of necessity employed. In the part on "Matter of Excuse and Justification," such expressions as the following frequently occur :—" Force reason-

"at any election." Compare with this Article 177 of the *Code Pénal*, the defining words of which are, "Tout fonctionnaire," &c., "qui aura agréé "des offres ou promesses, ou reçu des dons ou promesses pour faire un acte de sa "fonction ou de son emploi, même juste," &c. The history of the definition is given above, see pp. 252-255.

CH. XXXIV. "ably necessary for preventing the continuance or renewal of "a breach of the peace;" "Force not disproportioned to the "danger to be apprehended from the continuance of the riot." In the provision relating to provocation, are the words, "an "insult of such a nature as to deprive an ordinary person of "the power of self-control;" and there are many other expressions of the like kind. All of them leave, and are intended to leave, a considerable latitude to the jury in applying the provisions of the Draft Code to particular states of fact. In other cases a considerable amount of discretion is given to the court. Thus, for instance, it is declared to be a question of law whether a particular order given for the suppression of a riot is "manifestly unlawful"; whether the occasion of the sale, publishing, or exhibition of certain classes of books, engravings, &c., is such "as might be for "the public good"; and whether there is evidence for the jury of "excess." Again, all the provisions relating to libel are so drawn that wide latitude would be left to the jury in determining whether a given publication is or is not libellous.

Upon the whole, a detailed examination of the Draft Code will show that in respect of elasticity it makes very little if any change in the existing law. It clears up many doubts and removes many technicalities, but it neither increases nor diminishes to any material extent, if at all, any discretion at present vested in either judges or juries.

Section 5 constitutes an exception to this general remark. It provides that for the future all offences shall be prosecuted either under the Code or under some other statute, and not at common law. The result of this provision would be to put an end to a power attributed to the judges, in virtue of which they have (it has been said) declared acts to be offences at common law, although no such declaration was ever made before. And it is indeed the withdrawal of this supposed power of the judge to which the argument of want of elasticity is mainly addressed. It is worth while to give instances of the manner in which at different times this doctrine has been put forward and acted upon. Of the vagueness and crudity of the common law; the weakness of

the administration of justice in the Middle Ages; the impediments opposed to it by what was then called maintenance; the establishment of the Court of Star Chamber to remedy its defects, and the abuses which led to the abolition of that court in Charles I.'s reign, I have written at length and in detail, but I have not yet illustrated in detail the more modern claims made by or on behalf of the judges to declare new offences, though I have referred to some particular cases in which it has been done. CH. XXXIV.

The principle was stated in very wide terms in discussions upon the law of copyright, first by Mr. Justice Willes (Lord Mansfield's colleague), and afterwards by Lord Chief Baron Pollock. Mr. Justice Willes spoke of [1] "justice, moral fitness, "and public convenience, which when applied to a new "subject make common law without a precedent." Lord Chief Baron Pollock, many years afterwards, referring to this passage, observed, [2] "I entirely agree with the spirit of this "passage so far as it regards the repressing what is a public "evil, and preventing what would become a public mischief." In the observations made by the judges on a scheme of codification prepared in 1854, the same view was stated. The following are the words of Mr. Justice Crompton:—"I "think it unadvisable to lose the advantage of the power of "applying the principles of the common law to new offences "and combinations arising from time to time, which it is "hardly possible that any codification, however able and "complete, should effectually anticipate." In Sir William Erle's [3] *Treatise on the Law relating to Trades Unions*, already referred to at length, there are several passages bearing on this subject. Though the existence of this power as inherent in the judges has been asserted by several high authorities for a great length of time, it is hardly probable that any attempt would be made to exercise it at the present day; and any such attempt would be received with great opposition, and would place the bench in an invidious position. The last occasion on which such a course was taken was the treatment of conspiracies in restraint of trade as a common law misdemeanour. I

[1] Millar *v.* Taylor, 4 Burr. 2312.

[2] Jeffreys *v.* Boosey, 4 H.L.C. 396.

[3] See pp. 31—36 and 47—53.

have given the history of this matter, and it is by no means favourable to the declaration by the bench of new offences.

In times when legislation was scanty, the powers referred to were necessary. That the law in its earlier stages should be developed by judicial decisions from a few vague generalities was natural and inevitable. But a new state of things has come into existence. On the one hand, the courts have done their work; they have developed the law. On the other hand, parliament is regular in its sittings and active in its labours; and if the protection of society requires the enactment of additional penal laws, parliament will soon supply them. If parliament is not disposed to provide punishments for acts which are upon any ground objectionable or dangerous, the presumption is that they belong to that class of misconduct which it is not desirable to punish. Besides, there is every reason to believe that the criminal law is, and for a considerable time has been, sufficiently developed to provide all the protection for the public peace and for the property and persons of individuals which they are likely to require under almost any circumstances which can be imagined; and this is an additional reason why its further development ought to be left in the hands of parliament.

I do not believe that any offence known to the common law is unintentionally omitted from the Code. If any such offence exists, it must be one which, after the most careful search and inquiry, was unknown to every member of the Criminal Code Commission, and is unmentioned in any of the voluminous text-books which we carefully searched from end to end. Such an offence, if it exists, can scarcely be of any real danger to society.

The case with regard to matter of excuse and justification is somewhat different. It is one thing to say that no one shall be convicted of a crime unless his conduct is explicitly condemned by a written law. It is another thing to say that no excuse for what would otherwise be a crime shall be admitted unless it is explicitly provided for by a written law. The matters of excuse provided for in the Draft Code include all those in which the present law of England provides

materials for codification, but cases may be imagined in which an accused person ought to have the benefit of a full discussion upon principle and analogy before he was convicted of a crime. The case of necessity supplies one illustration; the case of acts of State, or acts done during an invasion or a civil war, might supply others. It is far better to decide such cases as and when they arise, and with the light which may then be thrown upon them both by circumstances and by the ingenuity and research of counsel, than to attempt to lay down rules beforehand, for which no definite materials exist. Much might be lost by doing so. Nothing could be gained by it except a fallacious appearance of completeness to a Code, which ought to be based upon the principle that it aims at nothing more than the reduction to a definite and systematic shape of results obtained and sanctioned by the experience of many centuries. On these grounds, s. 19 of the Code provided that all rules and principles of the common law which render any circumstances a justification or excuse for any act, or a defence to any charge, shall remain in force and be applicable to any defence to a charge under this act, except in so far as they are thereby altered or are inconsistent therewith.

Assuming then that the criminal law is to be codified, or reduced to writing, the next question which arises is as to the limits of the undertaking. The Bill which I drew in 1878 and the Draft Code appended to the Commissioners' Report in 1879 deal only with indictable offences, and it is essential to a full comprehension of the scope of both the Bill and the Draft Code to bear in mind the fact that neither of them is intended to embody the whole of the law relating to all indictable offences whatever. The object is to frame a Code, including, as far as practicable, all those crimes, whether at common law or created by statute, which in the ordinary course of affairs come to be tried in the courts of criminal justice.

Crimes may be punished by parliamentary impeachment; and some crimes, if committed by persons having privilege of peerage, must be tried in a peculiar court. Neither case is of frequent occurrence, and the code did not propose any

CH. XXXIV. alteration in either mode of procedure, or as to offences cognizable by impeachment only. Such at least was the intention of [1] the concluding words of section 5, which might perhaps be somewhat more plainly expressed. Nor was it thought expedient to interfere with those statutes by which official persons in the colonies and in India may be tried in this country for offences connected with their office.

But besides, there are many existing statutes under which persons may be indicted which it was thought best to leave untouched by the proposed Code. They are of different classes, and are left out for different reasons.

1. A certain number of statutes create indictable offences which are rather historical monuments of the political and religious struggles of former times than parts of the ordinary criminal law. As instances, I may refer to 1 Eliz. c. 2, which punishes "depraving or despising the Book of Common Prayer," on a third conviction by imprisonment for life; the 2 & 3 Edw. 6, c. 1, which inflicts the like punishment on clergymen who refuse to use the said [2] book; the 13 Eliz. c. 2, which makes it high treason to "use or put in ure" certain kinds of Papal Bulls (as to which, however, see 9 & 10 Vic. c. 59); the 13 Chas. 2, c. 5, which punishes with fine and imprisonment all persons who collect more than twenty signatures to a petition to parliament without leave from certain specified authorities.

2. A certain number of statutes create indictable offences

[1] "Provided also that nothing in this act shall extend to any proceed- "ing by way of parliamentary impeachment, or to affect the Court of "the Queen in Parliament, or the Court of the Lord High Steward, or the "right of any person entitled by the privilege of peerage to be tried therein, "or to affect the privilege of peerage in any way whatever." Upon these words as they stand, it might be argued either that no one could be impeached for any act not forbidden by the express words of the Code, or that if a peer was tried for murder he must be tried, not according to the definition in the Code, but according to the present common law definition, which, in other cases, is abolished by the Code. The intention was that the power to impeach for undefined offences should remain as it is, and that the procedure of the courts mentioned should in no case be interfered with, but that, if any such court tried any person for an offence defined by the Code, he should be tried according to the definitions contained in the Code. The words do not make this absolutely clear, but it would not be difficult to do it.

[2] These statutes are applied to the existing Prayer Book by 14 Chas. 2, c. 4, s. 20.

which cannot perhaps be said to be obsolete, but were passed under special circumstances, and which are seldom if ever enforced. To propose either to re-enact or to repeal them would be to revive, without any practical advantage, controversies which would probably be both bitter and useless. These accordingly were left untouched. As instances of statutes of this class, I may mention the Royal Marriage Act, 12 Geo. 3, c. 11, which subjects persons present at the celebration of certain marriages to a *præmunire;* the 21 Geo. 3, c. 49, the Lord's Day Observance Act, which declares certain places opened for amusement or discussion on Sundays to be disorderly houses; the 39 Geo. 3, c. 79, which subjects the members of certain societies to seven years' penal servitude; the 57 Geo. 3, c. 19, which forbids political meetings within a mile of Westminster Hall during the sitting of Parliament or the Courts of Justice; the clauses of the Catholic Emancipation Act, 10 Geo. 4, c. 7 (sections 28, 29, &c.), which bring Jesuits, monks, &c., under extremely severe penalties, extending under some circumstances to penal servitude for life.

3. Many statutes which create indictable offences are of so special a nature, and are so closely connected with branches of law which have little or nothing to do with crimes, commonly so called, that it seems better to leave them as they stand than to introduce them into a Criminal Code. The following are the most important statutes of this class:—The Acts for the Suppression of the Slave Trade (5 Geo. 4, c. 113, 36 & 37 Vic. c. 88), the Foreign Enlistment Act (33 & 34 Vic. c. 90), the Corrupt Practices Acts (17 & 18 Vic. c. 102, and some others), the Customs Act (39 & 40 Vic. c. 36), the Post Office Act (7 Will. 4 and 1 Vic. c. 36), the Merchant Shipping Acts (17 & 18 Vic. c. 104, &c.). These acts are complete in themselves; and, though each creates indictable offences, each would be mutilated and rendered far less convenient than it is at present if the parts which create offences were separated from the parts which deal with other matters; whilst, if the offences were transferred to the proposed Code in a form intelligible and complete, they would necessitate the introduction of an amount of matter which

CH. XXXIV. would render it inconveniently cumbersome, without any corresponding advantage.

4. A large number of statutes contain clauses of a penal nature intended to sanction their other provisions, and scarcely intelligible apart from them. Thus the 25 Hen. 8, c. 20, provides for the election of archbishops and bishops by deans and chapters upon the king's license, and section 6 enacts that persons refusing to elect shall be liable to a *præmunire*. The Marriage Acts of 1823 (4 Geo. 4, c. 76) and 1837 (6 & 7 Will. 4, c. 85) both punish the celebration of marriages otherwise than in certain specified ways. The acts which regulate lunatic asylums create several special offences (*e.g.* 8 & 9 Vic. c. 100, s. 56, 18 & 19 Vic. c. 105, s. 18). The acts, which establish certain prisons, give special powers to the keepers of the prisons, and subject the prisoners to special punishments for particular offences. (See as to Parkhurst Prison, 1 & 2 Vic. c. 82, s. 12; Pentonville, 5 & 6 Vic. c. 29, s. 24; Millbank, 6 & 7 Vic. c. 26, s. 22). It is obvious that many clauses of this sort are more conveniently placed in the special acts than they would be in a general Criminal Code.

The Commissioners considered that there were other acts dormant on the statute book the repeal of which seemed more properly to belong to the Statute Law Commissioners than to themselves. I have on several occasions examined the statute book with great care, and I think that the number of these acts not belonging to any of the other classes omitted from the Criminal Code must be small indeed. The only one which occurs to me are the statutes relating to champerty and maintenance. They might as well be repealed, but it is a matter of little importance. As champerty and maintenance would, if the Code became law, cease to be offences apart from the statutes, and as the statutes assume the existence of a common law offence, the enactment of the Code might perhaps repeal them by implication.

Lastly, the Code did not include temporary or exceptional provisions relating to Ireland, except in a few cases in which they forbid what ought to be offences at all times

and in all countries, and authorize proceedings which may be found advantageous in any time and any country.

The most important of the specific alterations in the existing law, relating both to procedure and to the definitions of crimes, I have already described and discussed in the earlier chapters of this work, and I need not here refer to them.

I will make one observation only upon the manner in which, in my opinion, the subject should be dealt with by parliament. No single man or body of men could, without presumption, say to parliament, "If you touch my or our work you will "spoil it;" but there is no presumption in pointing out that whatever value the Code possesses is due to its unity and coherence. If it were enacted into law as it stands, it would practically, though not absolutely, solve the problem which has so often been alleged to be insoluble, of condensing into a single volume, of [1] very moderate compass, the whole of the law relating to the definition and to the prosecution of indictable offences, expressed in a form so explicit and definite as practically to require no exposition, though it would admit, no doubt, of comment and illustration. The effect of such a work would depend principally on its unity, and I would acordingly suggest that if (as was proposed in the session of 1882) it is passed into law piecemeal, no one part should come into force till the whole had been completed. The parts might then be repealed, and the whole enacted as a single measure.

A reason of great weight for taking this course is to be found in the fact that the definitions and the procedure imply each other. Great confusion would be made if crimes continued to be legally defined and classified as being either felonies or misdemeanours whilst the procedure for trying them was based upon the assumption that this classification had been given up. There would, on the other hand, be no difficulty at all in passing different parts of the measure in

[1] The enacting part of the Code consists of 144 folio pages, including all the schedules excepting the repealing schedule. I think that it would fill about 250, or at the outside 300, such pages as those of Lord Wolseley's *Soldier's Pocket Book*, which contains in all 531 pages.

CH. XXXIV. different sessions, their operation being suspended till all had become law, and in then uniting them into a single measure, all the details of which would have been settled in the previous discussions. The matter is one which does not press. A Code would be a great convenience in the administration of justice, but the existing law is perfectly well understood, and is administered without the smallest difficulty or confusion. The principal difference made by the Code would be that of giving literary form to an existing system, and unity is obviously essential to the Code regarded as a literary work.

I may not unnaturally exaggerate the importance of such a contribution to the serious literature of the country as the enactment of a Criminal Code would constitute, but I think that others may equally naturally underrate it. It would represent nothing less than the deliberate measured judgment of the English nation on the definition of crimes and on the punishments to be awarded in respect of them, that judgment representing the accumulated experience of between six and seven centuries at least. I do not think that the immense moral importance of such a judgment is sufficiently appreciated, yet the criminal law may be described with truth as an expansion of the second table of the Ten Commandments. The statement in the Catechism of the positive duties of man to man corresponds step by step with the prohibitions of a Criminal Code. Those who honour and obey the Queen will not commit high treason or other political offences. Those who honour and obey in their due order and degree those who are put in authority under the Queen will not attempt to pervert the course of justice, nor will they disobey lawful commands, or violate the provisions of acts of parliament, or be guilty of corrupt practices with regard to public officers or in the discharge of powers confided to them by law. Those who hurt nobody by word will not commit libel or threaten injury to person, property, or reputation, nor will they lie in courts of justice or elsewhere, but will keep their tongues from evil speaking, lying, and slandering. Those who hurt nobody by deed will not commit murder, administer poison, or wound or assault others, or burn their

houses, or maliciously injure their property. Those who keep their hands from picking and stealing will commit neither thefts, nor fraudulent breaches of trust, nor forgery, nor will they pass bad money. Those who keep their bodies in temperance, soberness, and chastity, will not only not commit rape and other offences even more abominable, but will avoid the causes which lead to the commission of nearly all crimes. Those who learn and labour truly to get their own living will not be disorderly persons, cheats, impostors, rogues, or vagabonds, and will at all events have taken a long step towards doing their duty in the state of life to which it has pleased God to call them. The criminal law may thus be regarded as a detailed exposition of the different ways in which men may so violate their duty to their neighbours as to incur the indignation of society to an extent measured not inaccurately by the various punishments awarded to their misdeeds. I think that there never was more urgent necessity than there is now for the preaching of such a sermon in the most emphatic tones. At many times and in many places crime has been far more active and mischievous than it is at present, but there has never been an age of the world in which so much and such genuine doubt was felt as to the other sanctions on which morality rests. The religious sanction in particular has been immensely weakened, and unlimited license to every one to think as he pleases on all subjects, and especially on moral and religious subjects, is leading, and will continue to lead, many people to the conclusion that if they do not happen to like morality there is no reason why they should be moral. In such circumstances it seems to be specially necessary for those who do care for morality to make its one unquestionable, indisputable sanction as clear, and strong, and emphatic, as words and acts can make it. A man may disbelieve in God, heaven, and hell, he may care little for mankind, or society, or for the nation to which he belongs,—let him at least be plainly told what are the acts which will stamp him with infamy, hold him up to public execration, and bring him to the gallows, the gaol, or the lash.

TRIALS.

TRIALS.

THE following accounts of trials are intended to display the practical working of the institutions, rules, and principles described in earlier parts of the work, and in particular to enable the reader to compare the practical results of the system adopted in England, and in countries which derive their laws from England, with those of the system adopted in France and in many other parts of the continent of Europe. TRIALS.

[1] THE CASE OF JOHN DONELLAN.

John Donellan was tried at Warwick Assizes on the 30th March, 1781, before Mr. Justice Buller, for the murder by poison of his brother-in-law, Sir Theodosius Edward Allesley Boughton.

[2] Sir Theodosius Boughton was a young man of twenty, who, on attaining his majority, would have come into the possession of an estate of about £2,000 a year. In August, 1780, he was living with his mother, Lady Boughton, at Lawford Hall, in Warwickshire. [3] His brother-in-law, Captain Donellan, and his sister, Mrs. Donellan—who had been

[1] The references are to "The Proceedings at large in the Trial of John "Donellan, Esq., for the wilful Murder (by Poison) of Sir The. Edward Allesley "Boughton, Bart., late of Lawford Hall, in the County of Warwick. Tried "before Mr. Justice Buller, at the Assizes at Warwick, on Friday, the 31st day "of March, 1781, taken in Short-hand by the permission of the Judge, by "W. Blanchard." London. There is also a folio report by Gurney which I have compared.

[2] P. 33.

[3] P. 123.

TRIALS.

married in 1777—also formed part of the family. [1] They had lived in the house from about the month of June, 1778. [2] Sir Theodosius Boughton had returned to his mother's, from the house of a tutor (Mr. Jones), about Michaelmas in the same year. [3] In the event of his death, unmarried and without issue, the greater part of his fortune would descend to Mrs. Donellan; [4] but it was stated by the prisoner in his defence that he, on his marriage, entered into articles for the immediate settling of her whole fortune on herself and children, and deprived himself of the possibility of enjoying even a life-estate in case of her death; and that this settlement extended not only to the fortune, but to expectancies. It does not appear that the articles themselves were put in.

[5] Whilst Sir Theodosius Boughton was at Mr. Jones's he appears to have had a slight venereal complaint, for which he was attended by Mr. Kerr, of Northampton. He was under treatment for a disorder of the same kind in the summer of 1780. In all other respects, he appeared perfectly well to his mother, to his apothecary, and to other witnesses. Donellan, however, had for some time before been speaking of his health as bad. [6] Lady Boughton said, "Several times "before the deceased's death Mr. Donellan mentioned to me, "when I wished him to go to the country, that I did not "know what might happen in the family, and made several "observations on the bad state of his health. . . . When I "was talking about going to Bath, he said, 'Don't think of "'leaving Lawford, something or other may happen before "'you come back, for he is in a very bad state of health.' "I thought he might mean something of his being very "venturous in his going a hunting, or going into the water, "which might occasion his death." [7] It appeared, on cross-examination, that Lady Boughton went to Bath on the 1st of November, 1778; and that, when she was at Bath, she wrote to the Donellans to say that she was afraid her son was in a bad way, and that his fine complexion was gone. [8] A clergyman, Mr. Piers Newsam, proved that he had a conversation with Donellan about Sir Theodosius Boughton's

[1] P. 34. [2] P. 34. [3] P. 33. [4] P. 123.
[5] P. 60. [6] P. 34. [7] P. 47. [8] P. 58.

health on the 26th August, the Saturday before his death. "On that occasion," said Mr. Newsam, "he (Donellan) informed me that Sir Theodosius Boughton was in a very ill "state of health, that he had never got rid of the disorder "he had brought with him from school, and had been continually adding to it, that he had made such frequent use "of mercury outwardly that his blood was a mass of mercury and corruption." He added some other particulars, which led Mr. Newsam to say, that, "If that was the case, "I did not apprehend his life was worth two years' purchase; "he replied, 'Not one.'" At this time the deceased looked very well to Mr. Newsam, though not so florid as formerly.

TRIALS.

[1] On Tuesday, the 29th of August, 1780, Mr. Powell, an apothecary of Rugby, sent him a draught composed of jalap, lavender water, nutmeg water, syrup of saffron, and plain water. He had sent him a similar draught on the preceding Sunday. With the exception of the complaint under which he suffered, and which was slight, he was "in very good "health and great spirits." [2] The draught was delivered to Sir Theodosius Boughton himself, by a servant named Samuel Frost, about five or six on the Tuesday evening, and he took it up stairs with him. [3] He went out fishing after the medicine had been delivered to him; and Frost, who delivered it, joined him about seven, and stayed with him till he returned home about nine in the evening. He was on horseback all the time (the fishing was probably with nets), and had on a pair of boots; nor did he, during the whole time he was fishing, get his feet wet. Donellan was not there while the fishing was going on. [4] The family dined early that afternoon; and after dinner Lady Boughton and Mrs. Donellan went to take a walk in the garden: about seven the prisoner joined them, and said Sir Theodosius should have his physic, and that he had been to see them fishing, and he had endeavoured to persuade Sir Theodosius to come in—he was afraid he should catch cold—which appeared from the other evidence to be untrue. Sir Theodosius came in a little after nine, had his supper, and went to bed. His servant Frost went to his room at six next morning to

[1] Pp. 28-29. [2] Pp. 101-2. [3] Pp. 102-107. [4] P. 37.

TRIALS. ask for some straps for a net, which he was to take to Dunchurch, and Sir Theodosius got out of bed and gave them to him. He then appeared quite well. [1] On the preceding evening he had arranged with Lady Boughton to come to him at seven in the morning and give him his medicine. Some time before his death he used to keep it locked up in an inner room, and he had forgotten to take one dose. [2] Donellan said, "Why don't you set it in the outer room, "then you will not so soon forget it." After this the bottles were put on a shelf in the outer room, where, it would seem, any one would have access to them.

[3] At seven on the Tuesday morning, Lady Boughton accordingly came to give the medicine. She took particular notice of the bottle, shook it at her son's request, and, on his complaining that it was very nauseous, smelt it. She said, "I smelt it, and I observed it was very like the taste "of bitter almonds. Says I, 'Don't mind the taste of it,' "and he upon that drank the whole of it up." On smelling a bottle prepared with similar ingredients, but mixed with laurel water for the purpose of the trial, Lady Boughton said that the smell was very like that of the medicine which her son had taken. After taking the draught, Sir Theodosius said he thought he should not be able to keep it on his stomach, and washed out his mouth. In "about two minutes, "or less," he struggled violently, appeared convulsed, "and "made a prodigious rattling in his throat and stomach, "and a gurgling, and seemed to me" (Lady Boughton) "to "make very great efforts to keep it down." This went on for about ten minutes, when he became quiet, and seemed disposed to sleep; and his mother went out to complete her dress, [4] intending to go with Donellan to a place called Newnham Wells. In about five minutes she returned to her son's room, and found him lying with his eyes fixed, his teeth clenched, and froth running out of his mouth. She immediately sent for the doctor; and on Donellan's coming in, shortly after, said, [5] "Here is a terrible affair! I have been "giving my son something wrong instead of what the apothe-"cary should have sent. I said it was an unaccountable

[1] P. 37. [2] P. 35. [3] Pp. 38-9. [4] P. 100. [5] P. 40.

" thing in the doctor to have sent such a medicine; for if it " had been taken by a dog, it would have killed him." On this Donellan asked where the physic bottle was, and, on its being pointed out, took it and held it up, and poured some water into it; he shook it and emptied it out into some dirty water in the wash-hand bason. Lady Boughton said, " Good " God ! what are you about ? You should not have meddled " with the bottle." He then put some water in the other bottle (probably the bottle sent on the Sunday), and put his finger to it to taste it. Lady Boughton said again, " What " are you about ? you ought not to meddle with the bottle." He said he did it to taste it.

After this, two servants, Sarah Blundell (who died before the trial) and Catharine Amos, came in. Donellan ordered Blundell to take away the bottles and the bason, and put the bottles into her hand. Lady Boughton took them away, and bid her let them alone. Donellan then told her to take away the clothes, so that the room might be cleared, and a moment after Lady Boughton, whose back had been turned for a minute, saw Blundell with the bottles in her hand, and saw her take them away. At the time when this happened Sir Theodosius was in the act of dying. While the things were being put away, [1] Donellan said to the maid, " Take his stock- " ings, they have been wet; he has caught cold, to be sure, " and that may have occasioned his death." Lady Boughton upon this examined the stockings, and there was no mark or appearance of their having been wet.

Some time in the morning—and it would seem shortly after Sir Theodosius's death—[2] Donellan went to the gardener and told him to get two pigeons directly to put to his master's feet, as " he lies in sad agonies now with that nasty " distemper; it will be the death of him." [3] In the after-noon of the same day he told his wife, in Lady Boughton's presence, that she (Lady Boughton) had been pleased to take notice of his washing the bottles out; and he did not know what he should have done if he had not thought of putting in the water, and putting his finger to it to taste. He after-wards called up the coachman, and having reminded him that

[1] P. 45. [2] P. 108. [3] P. 43.

TRIALS.

he had seen him go out that morning about seven, observed that was the first time of his going out; and he had never been on the other side of the house that morning, and having insisted on this, said, "You are my evidence?" to which the man replied, "Yes, sir." [1] In the evening he said to the gardener, Francis Amos, "Now, gardener, you shall "live at your ease and work at your ease; it shall not be "as it was in Sir Theodosius's days; I wanted before to be "master. I have got master now, and I shall be master."

On the day of Sir Theodosius Boughton's death Donellan announced it to his guardian, Sir William Wheler, in a letter which mentioned none of the circumstances, but observed merely that he had been for some time past under the care of Mr. Powell for a complaint similar to that which he had at Eton, and had died that morning. Sir William Wheler returned a civil answer; but on the following Sunday he saw Mr. Newsam, and in consequence of what he heard from him, he wrote to Donellan on the 4th September, saying that there was a report that the death was very sudden, that there was great reason to believe the physic was improper, and might be the cause of the death; that he had inquired of Mr. Powell, whose reputation was at stake, and that it would be a great satisfaction to Mr. Powell to have the body opened. The letter proceeded to say:—"Though it is very late to do "it now, yet it will appear from the stomach whether there "is anything corrosive in it. As a friend to you, I must say "that it will be a great satisfaction to me, and I am sure it "must be so to you, Lady Boughton, and Mrs. Donellan, "when I assure you it is reported all over the country "that he was killed either by medicine or by poison. The "country will never be convinced to the contrary unless "the body is opened, and we shall all be very much blamed; "therefore I must request it of you and the family that "the body may be immediately opened by Mr. Wilmer "of Coventry, or Mr. Snow of Southam, in the presence of "Dr. Rattray, or any other physician that you and the family "may think proper." [2] Donellan answered this on the same day by a note, in which he said, "We most cheerfully wish

[1] P. 107. [2] Pp. 113—115.

TRIALS.

" to have the body of Sir Theodosius opened for the general " satisfaction, and the sooner it is done the better; therefore " I wish you could be here at the time." To this Sir William Wheler replied, " I am very happy to find that Lady Bough- " ton, Mrs. Donellan, and yourself approve of having the body " opened." He went on to say that it would not be proper for him to attend, or any one else, except the doctors.

In consequence of these letters, Dr. Rattray and Mr. Wilmer were sent for, and came to Lawford Hall about eight o'clock the same evening. [1] Donellan received them, and told them that he wished the body opened for the satisfaction of the family, producing to them Sir William Wheler's second letter—not the one about the suspicion of poison, but the one which contained a mere general expression of satisfaction at the willingness of the family to have the body opened, and excused himself from attending. He said nothing of any suspicion of poison. The body was found in a high state of putrefaction, and the two medical men, disgusted at the business, and not knowing of any special reason for inquiry, said that they thought at so late a period nothing could be discovered, declined to open the body, and left the house.

On the following morning (Tuesday, September 5) Donellan wrote to Sir W. Wheler a letter in which he said that Dr. Rattray and Mr. Wilmer and another medical man had been at the house, and that Mr. Powell had met them there. He then proceeded :—[2] " Upon the receipt of your last letter I gave " it them to peruse, and act as it directed; the four gentlemen " proceeded accordingly, and I am happy to inform you they " fully satisfied us, and I wish you would hear from them the " state they found the body in, as it would be an additional " satisfaction to me that you should hear the account from " themselves."

These expressions naturally led Sir W. Wheler to believe that the body had actually been opened, though in fact this was not the case.

On the same day [3] Mr. Bucknill, a surgeon at Rugby, came and offered to open the body, but Donellan said that as Dr. Rattray and Mr. Wilmer had declined, it would

[1] Pp. 63-4. [2] P. 116. [3] P. 97.

TRIALS.

be disrespectful to them to allow any one else to take their place.

On the next day, the 6th September, [1] Sir William Wheler heard that the body had not been opened, and heard also of Bucknill's offer. He accordingly wrote again to Donellan, saying, that from his last letter he had inferred that the body had been opened, but now found that the doctors had not thought it safe, and that Bucknill's offer to do so had been refused. He added that if Bucknill and Mr. Snow would do it they ought by all means to be allowed. [2] Donellan replied by a letter on the 8th September, the day of the funeral, in which he offered to have the funeral put off, if Sir W. Wheler wished, till after he (Sir W. Wheler) had seen Dr. Rattray and Mr. Wilmer. [3] He did not offer to have the body opened. In the meantime Sir W. Wheler had sent to Bucknill and Snow to go over to open the body, and Bucknill went for the purpose, and arrived at the house about two in the afternoon of Wednesday, the day of the funeral. Snow had not then arrived. Bucknill was sent for to a patient who was supposed to be dying, and went away, saying he should be back in an hour or an hour and a half. He came back in an hour, and [4] Donellan said "he was gone, and he had given his orders "what to do, and they were proceeding according to those "orders; and I am sorry you should have given yourself "this trouble." [5] Bucknill then left, and the body was buried without being opened.

These incidents prove that Donellan did all he could to destroy all evidence as to the cause of the death of the deceased. After Lady Boughton had said she thought there was something wrong about the draught, he threw it away. After Sir William Wheler said there was a report of poisoning, he kept the doctors in ignorance of it, and so prevented their opening the body. He then ingeniously contrived to lead Sir William Wheler into the belief that they had

[1] P. 118.
[2] P. 21. This letter was read in the opening speech of Mr. Howarth, the counsel for the Crown. It does not appear in the report of the evidence.
[3] P. 93. [4] It appears from the summing-up that *he* meant Snow.
[5] Pp. 99, 100.

opened it, and also parried and put aside Bucknill's offer to do so. **TRIALS.**

The suspicions of poisoning which prevailed were so strong, that the body was taken up on the Saturday after the funeral (September 9), and opened by Mr. Bucknill in the presence of Dr. Rattray, Mr. Wilmer, Mr. Powell, and Mr. Snow. It was in an advanced state of decomposition, and none of the appearances which presented themselves required to be explained by any other cause. There was, however, one exception, and it is remarkable that this piece of evidence was not given on the examination of the witness in chief, but was got out of Dr. Rattray—injudiciously and needlessly, it would seem—by questions asked by the prisoner's counsel in cross-examination. It was as follows:—

[1] " *Q.* Did you ever smell at that liquor that was in the " stomach? *A.* Ay, smell; I could not avoid smelling. " *Q.* Was it the same offensive smell? *A.* It in general had; " one could not expect any smell but partaking of that general " putrefaction of the body; but I had a particular taste in " my mouth at that time, a kind of biting acrimony upon my " tongue. And I have, in all the experiments I have made " with laurel-water, always had the same taste from breathing " over the water, a biting upon my tongue, and sometimes a " bitter taste upon the upper part of the fauces."

Having got out this evidence against his client whilst feeling his way towards the suggestion that putrefaction accounted for the whole, the counsel could not let it alone, but pursued his questions, and made matters worse.

" *Q.* Did you impute it to that cause, then? *A.* No; I " imputed it to the volatile salts escaping the body."

If the questions had stopped here, it would have left Dr. Rattray in the wrong, but, apparently encouraged by this advantage, the prisoner's counsel went a step further.

" *Q.* Were not the volatile salts likely to occasion that? " *A.* No. I complained to Mr. Wilmer, 'I have a very odd " 'taste in my mouth—my gums bleed.' *Q.* You attributed it " to the volatility of the salts? *A.* At that time I could not " account for it; but, in my experiments afterwards with the

[1] P. 83.

TRIALS.

"laurel-water, the effluvia of it constantly and uniformly "produced the same kind of taste; there is a very volatile "oil in it, I am persuaded."

The post-mortem examination was followed by an inquest. At the inquest, [1] Lady Boughton gave an account of Donellan's washing the bottle. When she did so, [2] he laid hold of her arm and gave her a twitch, and on their return home (said Lady Boughton), "he said to his wife, before me, that I had "no occasion to have told of the circumstance of his washing "the bottle. I was only to answer such questions as had "been put to me, and that question had not been asked me." At or after the inquest, [3] Donellan wrote a letter to the coroner and jury, of which the following passage was the most important part:—"During the time Sir Theodosius was here, "great part of it was spent in procuring things to kill rats, "with which this house swarms remarkably; he used to "have arsenic by the pound weight at a time, and laid the "same in and about the house in various places, and in as "many forms. We often expostulated with him about the "continued careless manner in which he acted respecting "himself and the family in general. His answer to us was, "that the men-servants knew where he laid the arsenic, "and for us, we had no business with it. At table, we "have not knowingly eaten anything for many months past "which we perceived him to touch, as we well knew his "extreme inattention to the bad effects of the various things "he frequently used to send for for the above purposes, as "well as for making up horse-medicines." [4] It was true that Sir Theodosius had bought a pound of arsenic for the purpose of poisoning fish and rats, as appeared on the cross-examination of his mother.

[5] Besides these circumstances, it was shown that Donellan had a still, in which he distilled roses. He kept the still in a room which he called his own, and in which he slept when Mrs. Donellan was confined. [6] Two or three days after Sir Theodosius's death, he brought out the still to the gardener to clean. It was full of lime, and the lime was wet. He

[1] P. 45. [2] P. 109. [3] P. 24.
[4] P. 53. [5] P. 106. [6] P. 107.

TRIALS.

said he used the lime to kill the fleas. [1] About a fortnight after the death, he brought the still to Catherine Amos, the cook, and asked her to put it in the oven and dry it, that it might not rust. It was dry, but had been washed. The cook said it would unsolder the tin to put it in the oven. [2] It was suggested by the prosecution that the object of this might be to take off the smell of laurel water.

[3] After Donellan was in custody, he had many conversations on the subject of the charge with a man named Darbyshire, a debtor. In these conversations, he frequently expressed his opinion that his brother-in-law had been poisoned. He said, "It was done amongst themselves,—himself" (the deceased), "Lady Boughton, the footman, and the apothecary." He also said that Lady Boughton was very covetous; that she had received an anonymous letter the day after Sir Theodosius's death, charging her plump with the poisoning of Sir Theodosius, that she called him, and told it to him, and trembled.

The medical evidence given against the prisoner was that of Dr. Rattray, Mr. Wilmer, Dr. Ash, and Professor Parsons, professor of anatomy at Oxford. They substantially agreed

[1] P. 57.

[2] In the observations on Donellan's case contained in Mr. Townsend's Life of Justice Buller (*Lives of English Judges*, p. 14), the following statement is made:—"In his [Donellan's] library there happened to be a single number of "the *Philosophical Transactions;* and of this single number the leaves had "been cut only in one place, and this place happened to contain an account "of the making of laurel-water by distillation." Nothing is said of this in the reports of the trial. It is something like the evidence in Palmer's case (*post*, p. 408) about the note on strychnine in the book, though much stronger.

[3] The following anecdote forms a curious addition to the evidence given at the trial:—My grandfather, well known as one of the leading members of the Anti-Slavery Society, took great interest in Donellan's case, and wrote a pamphlet against the verdict, which attracted much notice at the time. He was thus introduced to Donellan's attorney, who told him that he always believed in his client's innocence, till one day he (the attorney) proposed to Donellan to retain Mr. Dunning specially to defend him. Donellan agreed, and referred the attorney to Mrs. Donellan for authority to incur the necessary expense. Mrs. Donellan said she thought it needless to pay so high a fee. When the attorney reported this to Donellan, he burst into a rage, and cried out passionately,—"And who got it for her!" Then, seeing he had committed himself, he suddenly stopped. I have heard this story related by two of my grandfather's children, in nearly the same form, with the addition, that he was fond of telling it. At the time of the trial, Dunning was still in practice. He was raised to the peerage in the following year. The story itself is hearsay at the fifth remove as to a conversation 101 years ago. I, in 1882, say that my uncle and an aunt told me that my grandfather told them that an attorney told him that Donellan said, &c., in 1781.

TRIALS. in their opinions; but the way in which they were allowed to give their opinions differed much from what would be permitted in the present day, as their answers embodied their view of the evidence, with their opinion of the nature of the symptoms described. In the present day great pains are taken to prevent this, and to oblige skilled witnesses to give scientific opinions only, leaving the evidence to the jury.

Dr. Rattray said, [1] "Independent of the appearances of the "body, I am of opinion that draught, in consequence of the "symptoms which followed the swallowing of it, as described "by Lady Boughton, was poison, and the immediate cause of "his death."

Dr. Ash was asked, [2] "What is your opinion of the death of "Sir Theodosius Boughton?

"*A.*—I answer, he died in consequence of taking that "draught administered to him in the morning. He died in "so extraordinary a manner. It does not appear, from any part "of the evidence that has been this day given, that Sir Theo-"dosius had any disease upon him of a nature, either likely "or in any degree sufficient, to produce those violent conse-"quences which happened to him in the morning, when he "was seized in that extraordinary manner, nor do I know of "any medicine, properly so called, administered in any dose "or form, which could produce the same effects. I know "nothing but a poison, immediate in its operation, that could "be attended with such terrible consequences." He then went on to say that the post-mortem appearances in some degree resembled those of animals poisoned by vegetable poisons.

Dr. Parsons said, [3] "I have no difficulty in declaring it to "be my opinion, that he died in consequence of taking that "draught, instead of the medicine of jalap and rhubarb. "The nature of that poison appears sufficiently described by "Lady Boughton, in the account she gives of the smell of "the medicine when she poured it out in order to give it to "her son."

[4] Donellan, according to the practice of that time, delivered a written defence to the officer of the court, by whom it was

[1] P. 67. [2] P. 92. [3] P. 95. [4] Pp. 123—126.

read. It affords a good illustration of the fact that when counsel are refused to a prisoner every statement made by the prosecution amounts to an indirect interrogation of the prisoner. He does not attempt to explain the washing of the bottles. He does attempt to explain the transactions about the doctors; but, in doing so, he contradicts the witnesses. He says, "These gentlemen arrived about nine o'clock at night, "when I produced to them Sir William's letter, and desired "they would pursue his instructions." The letter he produced was the second letter, not the first. In the preceding part of his defence, he mentioned only one letter from Sir William Wheler. In reference to Bucknill's visit on the day of the funeral, he said that after Bucknill was called away, Snow came and waited for Bucknill a considerable time; and, on making inquiry of the plumber and others as to the state of the body, said he would not be concerned in opening it for Sir Theodosius's estate, and went away; after which the body was buried, "but not by my directions or desire." It is remarkable that Snow was not called on either side. According to our modern practice he ought to have been called by the Crown, unless there were strong reasons to the contrary.

On the whole, it appears that the defence contains one false suggestion, and one unproved suggestion which, if true, could have been proved; and that, on all the other parts of the prisoner's behaviour, it maintains a most significant silence. This is most important, as, being in writing, it must have been prepared before the trial.

Evidence for the prisoner was given [1] which showed that in June, 1778, two years before the alleged murder, he acted in such a way as to prevent his brother-in-law from fighting a duel, [2] and that, about a year afterwards, he was sent for as second on another occasion, though the quarrel was arranged before he arrived. This went to show that, if he was guilty, his design was not formed in 1778.

He also called the famous John Hunter to contradict the medical evidence for the prosecution.

In Palmer's case, the witnesses were confined in the closest way to speaking of the symptoms in general terms, and

[1] Pp. 47, 127. [2] P. 128.

TRIALS. were not permitted to give any sort of opinion as to the means by which they were produced. So far was this distinction from being understood, or at least favoured, in Donellan's case, that Hunter was hardly permitted to confine himself to an opinion on the symptoms. The gist of his evidence was, that all the symptoms were consistent with epilepsy or apoplexy, though also consistent with poisoning by laurel water. The greatness of John Hunter's name, and the curious difference between the practice of that day and our own, will excuse an extract of some length from his evidence. After being examined as to some of the circumstances of the case, he was asked:—

[1] "*Q.* Do you consider yourself as called upon by such "appearances to impute the death of the subject to poison?

"*A.* Certainly not. I should rather suspect it to be an "apoplexy, and I wish the head had been opened. It might "have removed all doubts.

"*Q.* From the appearances of the body . . . no inference "can be drawn for me to say he died of poison?

"*A.* Certainly not; it does not give the least suspicion."

He was then cross-examined.

[2] "*Q.* Having heard before to-day that a person, apparently "in health, had swallowed a draught which had produced the "symptoms described—I ask you whether any reasonable man "can entertain a doubt that that draught, whatever it was, "produced those appearances?

"*A.* I don't know well what answer to make to that "question.

"*Q.* I will therefore ask your opinion. Having heard the "account given of the health of this young gentleman, pre- "vious to the taking of the draught that morning, and the "symptoms that were produced immediately upon taking "the draught—I ask your opinion, as a man of judgment, "whether you do not think that draught was the occasion of "his death?

"*A.* With regard to the first part of the question, his being

[1] P. 131.

[2] Pp. 131-2. The phraseology is very ungrammatical; but it always is so n shorthand reports. The meaning is plain enough. Gurney's report is less incorrect as to language, but is hardly so vivid.

" in health, that explains nothing. Some healthy people, and " generally healthy people, die suddenly, and therefore I shall " lay no stress upon that. As to the circumstances, I own " there are suspicions. Every man is as good a judge as " I am.

[1] " *Court.*—You are to give your opinion upon the symptoms " only, not upon any other evidence given.

" *Q.* Upon the symptoms immediately produced upon the " swallowing of the draught, I ask your judgment and opinion, " whether that draught did not occasion his death?

" *Prisoner's Counsel.*—I object to that question, if it is put " in that form; if it is put 'after the swallowing it,' I have no " objection." (Probably the objection was that the words " produced *upon*" implied causation.)

" *Q.* Then 'after' swallowing it. What is your opinion, " allowing he had swallowed it?

" *A.* I can only say that is a circumstance in favour of such " opinion.

" *Court.*—That the draught was the occasion of his " death?

" *A.* No: because the symptoms afterwards are those of a " man dying, who was before in perfect health; a man dying " of an epilepsy or apoplexy. The symptoms would give one " those general ideas.

" *Court.*—It is the general idea you are asked about now; " from the symptoms which appeared upon Sir Theodosius " Boughton immediately after he took the draught, followed " by his death so very soon after—whether, upon that part of " the case, you are of opinion that the draught was the cause " of his death?

" *A.* If I knew the draught was poison I should say, most " probably, that the symptoms arose from that; but when I " don't know that that draught was poison, when I consider " that a number of other things might occasion his death, I " can't answer positively to it."

Here more questioning followed, the most important part of which was an inquiry whether laurel-water, if taken, would not have produced the symptoms; to which the answer was,

[1] *Sic* in Gurney's report.

TRIALS.

"I suppose it would." At last, the judge asked the following question:—

"*Q.* I wish you would be so good as to give me your opinion, "in the best manner you can, one way or the other, whether, "upon the whole—you have heard of the symptoms described "—it is your opinion the death proceeded from that medicine "or from any other cause?

"*A.* That question is distressing. I don't mean to equivo- "cate when I tell the sentiments of my own mind—what I "feel at the time. I can give nothing decisive."

Upon this evidence, the judge observed as follows:—

[1] "For the prisoner you have had one gentleman called who "is likewise of the faculty, and a very able man. One can "hardly say what his opinion is; he does not seem to form "any opinion at all of the matter; he at first said he could "not form an opinion whether the death was occasioned by "that poison or not, because he could conceive it might be "ascribed to other causes. I wished very much to have got "another answer from Mr. Hunter if I could,—What, upon "the whole, was the result of his attention to this case? "what his present opinion was? But he says he can say "nothing decisive. So that, on this point, if you are deter- "mining in the case upon the evidence of the gentlemen who "are skilled in the faculty, why, you have a very positive "opinion of four or five gentlemen of the faculty, on the one "side, that the deceased did die of poison; and, upon the "other side, what I really cannot myself call more than the "doubt of another—that is, Mr. Hunter."

The rest of the summing-up was equally unfavourable to the prisoner. After observing that the two questions were, whether the deceased was poisoned, and, if so, by whom—and after concluding the consideration of the first question by the remarks just quoted—the judge went through every particular of the prisoner's conduct, showing how they suggested that he was the poisoner. Describing Donellan's false statement that the deceased had taken cold, he asked, "Is "that truth? . . . What was there that called upon the "prisoner, unnecessarily, to tell such a story? If you can

[1] P. 139.

"find an answer to that that does not impute guilt to the "prisoner, you will adopt it; but on this fact, and many others "that I must point out to your attention, I can only say, that "unnecessary, strange, and contradictory declarations cannot "be accounted for otherwise than by such fatality, which "only portends guilt." He then went through the other circumstances with a dexterity to which an abstract cannot do justice, here and there qualifying the points against the prisoner by suggestions in his favour. For instance, after remarking on the keeping back of Sir W. Wheler's letter, he says, "It is possible the prisoner might suppose Sir "W. Wheler's ideas were sufficiently communicated to the "physicians and surgeons by the last letter, and therefore "unnecessary to show the first." On the whole, however, every observation made the other way.

Upon this evidence and summing-up, Donellan was almost immediately convicted, and was afterwards hung.

Few cases have given rise to more discussion. Both the conduct of the judge and the verdict of the jury were warmly censured at the time.

In the present day, I doubt whether the prisoner would have been convicted, because the medical evidence certainly is far less strong than it might have been. John Hunter's evidence obviously comes to this. Epilepsy or apoplexy or poison are equally probable solutions of the facts proved if we look only at the symptoms, and there is in the nature of things no reason why a man apparently in perfect health should not have a fatal attack of epilepsy or apoplexy a few minutes after drinking a glass of medicine as well as at any other time. On the other hand, the symptoms were precisely those which would be caused by poisoning with laurel-water. The evidence as to the smell of the medicine, and as to the smell perceived by the doctors who examined the body, points directly to the conclusion that laurel-water was used. Every incident in Donellan's conduct pointed to his guilt. He took every step which a guilty man would naturally take. Before the death he did all he could to prevent surprise at its occurrence and to lead people to expect it. After the death he did his best to destroy all

TRIALS.

evidence as to its cause and to prevent the examination of the body. He also prepared means by which he obtained an opportunity for committing the crime, and he had the means by which he might prepare the poison supposed to have been used if he were so disposed. Moreover, he entirely failed to give any plausible explanation of the course which he was proved to have taken. To my mind, all this taken together raises so strong a probability of his guilt, that I think the jury were right in rejecting the possibility that the death might have been caused by apoplexy or epilepsy happening to follow close upon the administration of the medicine. No doubt the case is near the indeterminate and indeterminable line at which reasonable doubt would begin. It forms a curious contrast to the case of Belany, tried and acquitted for the murder of his wife, on evidence which was rather stronger, in 1844.

[1] THE CASE OF WILLIAM PALMER.

On the 14th of May, 1856, William Palmer was tried at the Old Bailey, under the powers conferred on the Court of Queen's Bench by 19 Vic. c. 16, for the murder of John Parsons Cook at Rugeley, in Staffordshire. The trial lasted for twelve days, and ended on the 27th May, when the prisoner was convicted, and received sentence of death, on which he was afterwards executed at Stafford. TRIALS.

Palmer was a general medical practitioner at Rugeley, much engaged in sporting transactions. Cook, his intimate friend, also a sporting man, after attending Shrewsbury races with Palmer on the 13th November, 1855, returned in his company to Rugeley, and died at the Talbot Arms Hotel, at that place, soon after midnight, on the 21st November, 1855, under circumstances which raised a suspicion that he had been poisoned by Palmer. The case against Palmer was, that he had a strong motive to murder his friend, and that his conduct before, at the time of, and after his death, coupled with the circumstances of the death itself, left no reasonable doubt that he did murder him, by poisoning him with antimony and strychnine.

The evidence stood as follows: At the time of Cook's death, Palmer was involved in bill transactions, which appear to have begun in the year 1853. [2] His wife died in September, 1854, and on her death he received £13,000 on policies on her life, nearly the whole of which was applied to the

[1] The authority referred to is "A Verbatim Report of the Trial of William "Palmer, &c., transcribed from the Shorthand Notes of W. Angelo Bennett." London: Allen. 1856.

[2] A true bill for her murder was returned against the prisoner; but as he was convicted in Cook's case, it was not proceeded with.

TRIALS. discharge of his liabilities. In the course of the year 1855 he raised other large sums, amounting in all to £13,500, on what purported to be acceptances of his mother's. The bills were renewed from time to time at enormous interest (usually sixty per cent. per annum) by a money-lender named Pratt, who, at the time of Cook's death, held eight bills—four on his own account and four on account of his client; two already overdue, and six others falling due—some in November and others in January. About £1,000 had been paid off in the course of the year, so that the total amount then due, or shortly to fall due to Pratt, was £12,500. The only means which Palmer had by which these bills could be provided for was a policy on the life of his brother, Walter Palmer, for £13,000. [1] Walter Palmer died in August, 1855, and William Palmer had instructed Pratt to recover the amount from the insurance office, but the office refused to pay. [2] In consequence of this difficulty, Pratt earnestly pressed Palmer to pay something in order to keep down the interest or diminish the principal due on the bills. He issued writs against him and his mother on the 6th November, and informed him in substance that they would be served at once, unless he would pay something on account. Shortly before the Shrewsbury races he had accordingly paid three sums, amounting in all to £800, of which £600 went in reduction of the principal, and £200 was deducted for interest. It was understood that more money was to be raised as early as possible.

[3] Besides the money due to Pratt, Mr. Wright, of Birmingham, held bills for £10,400. Part of these, amounting to £6,500, purported to be accepted by Mrs. Palmer, part were collaterally secured by a bill of sale of the whole of William Palmer's property. These bills would fall due in the first or second week of November. Mr. Padwick also held a bill of the same kind for £2,000, on which £1,000 remained unpaid, and which was twelve months overdue on the 6th October, 1855. [4] Palmer, on the 12th November, had given Espin a cheque antedated on the 28th November, for the other £1,000.

[1] A bill for his murder also was returned against William Palmer; but, in consequence of his conviction, was not proceeded with.
[2] Pratt, 165-6. [3] Wright, 169-70. [4] Espin, 164.

[1] Mrs. Sarah Palmer's acceptance was on nearly all these bills, and in every instance was forged.

The result is that, about the time of the Shrewsbury races, Palmer was being pressed for payment on forged acceptances to the amount of nearly £20,000, and that his only resources were a certain amount of personal property over which Wright held a bill of sale, and a policy for £13,000, the payment of which was refused by the office. Should he succeed in obtaining payment, he might no doubt struggle through his difficulties, but there still remained the £1,000 antedated cheque given to Espin, which it was necessary to provide for at once by some means or other. That he had no funds of his own was proved by the fact that [2] his balance at the bank on the 19th November was £9 6*s.*, [3] and that he had to borrow £25 of a farmer, named Wallbank, to go to Shrewsbury races. It follows that he was under the most pressing necessity to obtain a considerable sum of money, as even a short delay in obtaining it might involve him not only in insolvency, but in a prosecution for uttering forged acceptances.

[4] Besides the embarrassment arising from the bills in the hands of Pratt, Wright, and Padwick, Palmer was involved in a transaction with Cook, which had a bearing on the rest of the case. Cook and he were parties to a bill for £500, which Pratt had discounted, giving £375 in cash, and a wine warrant for £65, and charging £60 for discount and expenses. He also required an assignment of two racehorses of Cook's —Polestar and Sirius—as a collateral security. By Palmer's request the £375, in the shape of a cheque payable to Cook's order, and the wine warrant, were sent by post to Palmer at Doncaster. Palmer wrote Cook's endorsement on the cheque, and paid the amount to his own credit at the bank at Rugeley. On the part of the prosecution it was said that this transaction afforded a reason why Palmer should desire to be rid of Cook, inasmuch as it amounted to a forgery by which Cook was defrauded of £375. It appeared, however, on the other side, that there were £300 worth of notes, relating to some other transaction, in the letter which inclosed the cheque; and

[1] Strawbridge, 104, 169, 170.
[2] Strawbridge, 169.
[3] Wallbank, 169.
[4] Pratt, 167.

TRIALS.

as it did not appear that Cook had complained of getting no consideration for his acceptance, it was suggested that he had authorised Palmer to write his name on the back of the cheque, and had taken the notes himself. This arrangement seems not improbable, as it would otherwise be hard to explain why Cook acquiesced in receiving nothing for his acceptance, and there was evidence that he meant to provide for the bill when it became due. [1] It also appeared late in the case that there was another bill for £500, in which Cook and Palmer were jointly interested.

[2] Such was Palmer's position when he went to Shrewsbury races, on Monday, the 12th November, 1855. Cook was there also; and on Tuesday, the 13th, his mare Polestar won the Shrewsbury Handicap, by which he became entitled to the stakes, worth about £380, and bets to the amount of nearly £2,000. Of these bets he received £700 or £800 on the course at Shrewsbury. The rest was to be paid at Tattersall's on the following Monday, the 19th November. After the race Cook invited some of his friends to dinner at the Raven Hotel, and on that occasion and on the following day he was both sober and well. On the Wednesday night, a man named Ishmael Fisher came into the sitting-room which Palmer shared with Cook, and found them in company with some other men drinking brandy-and-water. Cook complained that the brandy "burned his throat dreadfully," and put down his glass with a small quantity remaining in it. Palmer drank up what was left, and, handing the glass to Read, asked him if he thought there was anything in it; to which Read replied, "What's the use of handing me the glass "when it's empty?" Cook shortly afterwards left the room, called out Fisher, and told him that he had been very sick, and "he thought that damned Palmer had dosed him." He also handed over to Fisher £700 or £800 in notes to keep for him. He then became sick again, and was ill all night, and had to be attended by a doctor. He told the doctor, Mr. Gibson, that he thought he had been poisoned, and he was

[1] Pp. 307, 310.
[2] Fisher, 25-6. Read, 30. Gibson, 31. Thos. Jones, 29.

TRIALS.

treated on that supposition. Next day Palmer told Fisher that Cook had said that he (Palmer) had been putting something into his brandy. He added that he did not play such tricks with people, and that Cook had been drunk the night before—which appeared not to be the case. Fisher did not expressly say that he returned the money to Cook, but from the course of the evidence it seems that he did, for Cook asked him to pay Pratt £200 at once, and to repay himself on the following Monday out of the bets which he would receive on Cook's account at the settling at Tattersall's.

[1] About half-past ten on the Wednesday, and apparently shortly before Cook drank the brandy-and-water which he complained of, Palmer was seen by a Mrs. Brooks in the passage, looking at a glass lamp through a tumbler which contained some clear fluid like water, and which he was shaking and turning in his hand. There appears, however, to have been no secrecy in this, as he spoke to Mrs. Brooks, and continued to hold and shake the tumbler as he did so. [2] George Myatt was called to contradict this for the prisoner. He said that he was in the room when Palmer and Cook came in; that Cook made a remark about the brandy, though he gave a different version of it from Fisher and Read; that he did not see anything put in it, and that if anything had been put in it he should have seen. He also swore that Palmer never left the room from the time he came in till Cook went to bed. He also put the time later than Fisher and Read. All this, however, came to very little. It was the sort of difference which always arises in the details of evidence. As Myatt was a friend of Palmer's, he probably remembered the matter (perhaps honestly enough) in a way more favourable to him than the other witnesses.

It appeared from the evidence of Mrs. Brooks, and also from that of a man named Herring, that other persons besides Cook were taken ill at Shrewsbury, on the evening in question, with similar symptoms. [4] Mrs. Brooks said, "We made "an observation we thought the water might have been

[1] P. 52.
[2] G. Myatt, 264.
[3] Herring, 105.
[4] Brooks, 54.

TRIALS.

"poisoned in Shrewsbury." [1] Palmer himself vomited on his way back to Rugeley, according to Myatt.

The evidence as to what passed at Shrewsbury clearly proves that, Palmer being then in great want of money, Cook was to his knowledge in possession of £700 or £800 in bank-notes, and was also entitled to receive on the following Monday about £1,400 more. It also shows that Palmer may have given him a dose of antimony, though the weight of the evidence to this effect is weakened by the proof that diarrhœa and vomiting were prevalent in Shrewsbury at the time. It is, however, important in connection with subsequent events.

On Thursday, November 15th, Palmer and Cook returned together to Rugeley, which they reached about ten at night. Cook went to the Talbot Arms, and Palmer to his own house immediately opposite. Cook still complained of being unwell. On the Friday he dined with Palmer, in company with an attorney, Mr. Jeremiah Smith, and returned perfectly sober about ten in the evening. At eight on the following morning (November 17th) Palmer came over, and ordered a cup of coffee for him. The coffee was given to Cook by Mills the chambermaid, in Palmer's presence. When she next went to his room, an hour or two afterwards, it had been vomited. [2] In the course of the day, and apparently about the middle of the day, Palmer sent a charwoman, named Rowley, to get some broth for Cook at an inn called the Albion. She brought it to Palmer's house, put it by the fire to warm, and left the room. [3] Soon after, Palmer brought it out, poured it into a cup, and sent it to the Talbot Arms with a message that it came from Mr. Jeremiah Smith. [4] The broth was given to Cook, who at first refused to take it. Palmer, however, came in, and said he must have it. [5] The chambermaid brought back the broth, which she had taken down stairs, and left it in the room. It also was thrown up. [6] In the course of the afternoon, Palmer called in Mr. Bamford, a surgeon eighty years of age, to see Cook, and told him that when Cook dined at

[1] Myatt, 264. [2] Mills, 32-3. [3] Rowley, 59.
[4] G. T. Barnes, 54. Mills, 34. [5] Mills, 34.
[6] Bamford, Dep. 114. Evidence, 164.

his (Palmer's) house he had taken too much champagne. Mr. Bamford, however, found no bilious symptoms about him, and he said he had drunk only two glasses. On the Saturday night, Mr. Jeremiah Smith slept in Cook's room, as he was still ill. [1] On the Sunday, between twelve and one, Palmer sent over his gardener, Hawley, with some more broth for Cook. [2] Elizabeth Mills, the servant at the Talbot Arms, tasted it, taking two or three spoonfuls. She became exceedingly sick about half an hour afterwards, and vomited till five o'clock in the afternoon. She was so ill that she had to go to bed. [3] This broth also was taken to Cook, and the cup afterwards returned to Palmer. It appears to have been taken and vomited, though the evidence is not quite explicit on that point. [4] By the Sunday's post Palmer wrote to Mr. Jones, an apothecary, and Cook's most intimate friend, to come and see him. He said that Cook was "confined to his "bed with a severe bilious attack, combined with diarrhœa." [5] The servant Mills said there was no diarrhœa. It was observed on the part of the defence that this letter was strong proof of innocence. [6] The prosecution suggested that it was "part of a deep design, and was meant to make "evidence in the prisoner's favour." The fair conclusion seems to be, that it was an ambiguous act which ought to weigh neither way, though the falsehood about Cook's symptoms is suspicious as far as it goes. TRIALS.

[7] On the night between Sunday and Monday Cook had some sort of attack. When the servant Mills went into his room on the Monday, he said, "I was just mad for two "minutes." She said, "Why did you not ring the bell?" He said, "I thought that you would be all fast asleep, and "not hear it." He also said he was disturbed by a quarrel in the street. It might have waked and disturbed him, but he was not sure. This incident was not mentioned at first by Barnes and Mills, but was brought out on their being recalled at the request of Serjeant Shee. It was considered

[1] Hawley, 59. [2] Mills, 34. Barnes, 54. [3] Barnes, 54. Mills, 34.
[4] W. H. Jones, 61-2. [5] Mills, 35.
[6] Compare Smethurst's calling in Dr. Todd, post, p. 445.
[7] Barnes, 70. Mills, 70.

TRIALS.

important for the defence, as proving that Cook had had an attack of some kind before it was suggested that any strychnine was administered; and the principal medical witness for the defence, [1] Mr. Nunneley, referred to it with this view.

[2] On the Monday, about a quarter-past or half-past seven, Palmer again visited Cook; but as he was in London about half-past two, he must have gone to town by an early train. During the whole of the Monday Cook was much better. He dressed himself, saw a jockey and his trainer, and the sickness ceased.

In the meantime Palmer was in London. [3] He met by appointment a man named Herring, who was connected with the turf. Palmer told him he wished to settle Cook's account, and read to him from a list, which Herring copied as Palmer read it, the particulars of the bets which he was to receive. They amounted to £984 clear. Of this sum Palmer instructed Herring to pay £450 to Pratt and £350 to Padwick. The nature of the debt to Padwick was not proved in evidence, as Padwick himself was not called. Palmer told Herring the £450 was to settle the bill for which Cook had assigned his horses. [4] He wrote Pratt on the same day a letter in these words: "Dear Sir,—You will place the £50 I have just paid "you and the £450 you will receive from Mr. Herring, to-"gether £500, and the £200 you received on Saturday" (from Fisher) "towards payment of my mother's acceptance for "£2,000 due 25th October."

Herring received upwards of £800, and paid part of it away according to Palmer's directions. [5] Pratt gave Palmer credit for the £450; but the £350 was not paid to Padwick, according to Palmer's directions, as part was retained by Mr. Herring for some debts due from Cook to him, and Herring received less than he expected. [6] In his reply, the Attorney-General said that the £350 intended to be paid to Padwick was on account of a bet, and suggested that the motive was to keep Padwick quiet as to the antedated cheque for £1,000 given to Espin on Padwick's account. There was no evidence of

[1] P. 217. [2] Mills, 35. [3] Herring, 101-2.
[4] Read by Serjt. Shee, p. 180. [5] Pratt, 167; Herring, 104. [6] P. 300-1.

this, and it is not of much importance. It was clearly intended to be paid to Padwick on account, not of Cook (except possibly as to a small part), but of Palmer. Palmer thus disposed, or attempted to dispose, in the course of Monday, Nov. 19th, of the whole of Cook's winnings for his own advantage.

This is a convenient place to mention the final result of the transaction relating to the bill for £500, in which Cook and Palmer were jointly interested. [1] On the Friday when Cook and Palmer dined together (Nov. 16), Cook wrote to Fisher (his agent) in these words: "It is of very great im-"portance to both Palmer and myself that the sum of £500 "should be paid to a Mr. Pratt, of 5, Queen Street, Mayfair; "£300 *has been sent up to-night*, and if you would be kind "enough to pay the other £200 to-morrow, on the receipt of "this, you will greatly oblige me. I will settle it on Monday "at Tattersall's." [2] Fisher did pay the £200, expecting, as he said, to settle Cook's account on the Monday, and repay himself. [3] On the Saturday, Nov. 17th (the day after the date of the letter), "a person," said Pratt, "whose name I "did not know, called on me with a cheque, and paid me "£300 on account of *the prisoner;* that" [apparently the cheque, not the £300] "was a cheque of Mr. Fisher's." [4] When Pratt heard of Cook's death, he wrote to Palmer, saying, "The death of Mr. Cook will now compel you to look "about as to the payment of the bill for £500 due the 2nd "of December."

Great use was made of these letters by the defence. It was argued that they proved that Cook was helping Palmer, and was eager to relieve him from the pressure put on him by Pratt; that in consequence of this he not only took up the £500 bill, but authorised Palmer to apply the £800 to similar purposes, and to get the amount settled by Herring, instead of Fisher, so that Fisher might not stop out of it the £200 which he had advanced to Pratt. It was asked how it could be Palmer's interest, on this supposition, that Cook should die, especially as the first consequence of his death was Pratt's application for the money due on the £500 bill.

[1] Fisher, 29. [2] Fisher, 27. [3] P. 166. [4] Read by Serjt. Shee, p. 181.

TRIALS.

These arguments were, no doubt, plausible; and the fact that Cook's death compelled Pratt to look to Palmer for the payment of the £500 lends them weight; but it may be asked, on the other hand, why should Cook give away the whole of his winnings to Palmer? Why should Cook allow Palmer to appropriate to the diminution of his own liabilities the £200 which Fisher had advanced to the credit of the bill on which both were liable? Why should he join with Palmer in a plan for defrauding Fisher of his security for this advance? No answer to any of these questions was suggested. As to the £300, Cook's letter to Fisher says, "£300 *has been* sent up this "evening." There was evidence that Pratt never received it, for he applied to Palmer for the money on Cook's death. Moreover, [1] Pratt said that, on the Saturday, he did receive £300 *on account of Palmer,* which he placed to the account of the forged acceptance for £2,000. Where did Palmer get the money? The suggestion of the prosecution was, that Cook gave it him to pay to Pratt on account of their joint bill, and that he paid it on his own account. This was probably the true view of the case. The observation that Pratt, on hearing of Cook's death, applied to Palmer to pay the £500 bill is met by the reflection that that bill was genuine, and collaterally secured by the assignment of the racehorses, and that the other bill bore a forged acceptance, and must be satisfied at all hazards. The result is, that on the Monday evening Palmer had the most imperious interest in Cook's death, for he had robbed him of all he had in the world, except the equity of redemption in his two horses.

[2] On Monday evening (Nov. 19th), Palmer returned to Rugeley, and went to the shop of Mr. Salt, a surgeon there, about nine P.M. He saw Newton, Salt's assistant, and asked him for three grains of strychnine, which were accordingly given to him. Newton never mentioned this transaction till a day or two before his examination as a witness in London, though he was examined on the inquest. He explained this by saying that there had been a quarrel between Palmer and Salt, his (Newton's) master, and that he thought Salt would be displeased with him for having given Palmer anything.

[1] Pratt, 166. [2] Newton, 71-2.

No doubt, the concealment was improper, but nothing appeared on cross-examination to suggest that the witness was wilfully perjured. TRIALS.

[1] Cook had been much better throughout Monday, and on Monday evening, [2] Mr. Bamford, who was attending him, brought some pills for him, which he left at the hotel. They contained neither antimony nor strychnine. [3] They were taken up in the box in which they came to Cook's room by the chambermaid, and were left there on the dressing-table, about eight o'clock. [4] Palmer came (according to Barnes, the waitress), between eight and nine, and [5] Mills said she saw him sitting by the fire between nine and ten.

If this evidence were believed, he would have had an opportunity of substituting poisoned pills for those sent by Mr. Bamford, just after he had, according to Newton, procured strychnine. The evidence, however, [6] was contradicted by a witness called for the prisoner, Jeremiah Smith, the attorney. He said that on the Monday evening, about ten minutes past ten, he saw Palmer coming in a car from the direction of Stafford; that they then went up to Cook's room together, stayed two or three minutes, and went with Smith to the house of old Mrs. Palmer, his mother. Cook said, "Bamford "had sent him some pills, and he had taken them, and "Palmer was late, intimating that he should not have taken "them if he had thought Palmer would have called in "before." If this evidence were believed, it would, of course, have proved that Cook took the pills which Bamford sent as he sent them. [7] Smith, however, was cross-examined by the Attorney-General at great length. He admitted, with the greatest reluctance, that he had witnessed the assignment of a policy for £13,000 by Walter to William Palmer; that he wrote to an office to effect an insurance for £10,000 on the life of Bates, who was Palmer's groom at £1 a week; that he

[1] Mills, 35. [2] Bamford, 165. [3] Mills, 35-6.
[4] Barnes, 55. [5] Mills, 36. [6] J. Smith, 271.
[7] Smith, 275—7. No abbreviation can give the effect of this cross-examination. The witness's efforts to gain time, and his distress as the various answers were extorted from him by degrees, may be faintly traced in the report. The witness's face was covered with sweat, and the papers put into his hands shook and rustled.

TRIALS. tried, after Walter Palmer's death, to get his widow to give up her claim on the policy; that he was applied to to attest other proposals for insurances on Walter Palmer's life for similar amounts; and that he had got a cheque for £5 for attesting the assignment.

[1] Lord Campbell said of this witness, in summing up, "Can "you believe a man who so disgraces himself in the witness-"box? It is for you to say what faith you can place in "a witness who, by his own admission, engaged in such "fraudulent proceedings."

It is curious that, though the credit of this witness was so much shaken in cross-examination, and though he was contradicted both by Mills and Newton, he must have been right, and they wrong, as to the time when Palmer came down to Rugeley that evening. [2] Mr. Matthews, the inspector of police at the Euston Station, proved that the only train by which Palmer could have left London after half-past two ([3] when he met Herring) started at five, and reached Stafford on the night in question at a quarter to nine. It is about ten miles from Stafford to Rugeley, so that he could not have got across by the road in much less than an hour; yet Newton said he saw him "about nine," and Mills saw him "between nine and "ten." Nothing, however, is more difficult than to speak accurately as to time; on the other hand, if Smith spoke the truth, Newton could not have seen him at all that night, and Mills, if at all, must have seen him for a moment only in Smith's company. Mills never mentioned Smith, and Smith would not venture to swear she or any one else saw him at the Talbot Arms. It was a suspicious circumstance that Serjeant Shee did not open Smith's evidence to the jury. An opportunity for perjury was afforded by the mistake made by the witnesses as to the time, which the defence were able to prove by the evidence of the police inspector. If Smith were disposed to tell an untruth, the knowledge of this fact would enable him to do so with an appearance of plausibility.

Whatever view is taken as to the effect of this evidence, [4] it was clearly proved that, about the middle of the night between Monday and Tuesday, Cook had a violent attack of some sort.

[1] P. 323. [2] P. 263. [3] Herring, 102. [4] Mills, 37. Barnes, 55.

About twelve, or a little before, his bell rang; he screamed violently. When Mills, the servant, came in, he was sitting up in bed, and asked that Palmer might be fetched at once. He was beating the bedclothes; he said he should suffocate if he lay down. His head and neck and his whole body jumped and jerked. He had great difficulty in breathing, and his eyes protruded. His hand was stiff, and he asked to have it rubbed. Palmer came in, and gave him a draught and some pills. He snapped at the glass, and got both it and the spoon between his teeth. He had also great difficulty in swallowing the pills. After this he got more easy, and Palmer stayed by him some time, sleeping in an easy chair. TRIALS.

[1]Great efforts were made, in cross-examination, to shake the evidence of Mills by showing that she had altered the evidence which she gave before the coroner, so as to make her description of the symptoms tally with those of poisoning by strychnine, and also by showing that she had been drilled as to the evidence which she was to give by persons connected with the prosecution. She denied most of the suggestions conveyed by the questions asked her, and explained others. As to the differences between her evidence before the coroner and at the trial, a witness ([2] Mr. Gardner, an attorney) was called to show that the depositions were not properly taken at the inquest.

On the following day, Tuesday, the 20th, Cook was a good deal better. [3] In the middle of the day, he sent the boots to ask Palmer if he might have a cup of coffee. Palmer said he might, and came over, tasted a cup made by the servant, and took it from her hands to give it to Cook. This coffee was afterwards thrown up.

[4] A little before or after this, the exact hour is not important, Palmer went to the shop of Hawkins, a druggist at Rugeley, and was there served by his apprentice, Roberts, with two drachms of prussic acid, six grains of strychnine, and two drachms of Batley's sedative. Whilst he was making the purchase, Newton, from whom he had obtained the other strychnine the night before, came in: Palmer took him to the door, saying he wished to speak to him, and when he was

[1] Pp. 41—45.
[2] P. 50. As to the coroner's conduct, see below.
[3] Mills, 39.
[4] Roberts, 76. Newton, 72.

TRIALS. there asked him a question about the farm of a Mr. Edwin Salt—a matter with which he had nothing at all to do. Whilst they were there, a third person came up and spoke to Newton, on which Palmer went back into Hawkins's shop and took away the things, Newton not seeing what he took. The obvious suggestion upon this is that Palmer wanted to prevent Newton from seeing what he was about. No attempt even was made to shake, or in any way discredit, Roberts the apprentice.

[1] At about four P.M. Mr. Jones, the friend to whom Palmer had written, arrived from Lutterworth. He examined Cook in Palmer's presence, and remarked that he had not the tongue of a bilious patient, to which Palmer replied, "You "should have seen it before." Cook appeared to be better during the Tuesday, and was in good spirits. At about seven P.M. Mr. Bamford came in, and Cook told him in Palmer's presence that he objected to the pills as they had made him ill the night before. The three medical men then had a private consultation. Palmer proposed that Bamford should make up the pills as on the night before, and that Jones should not tell Cook what they were made of, as he objected to the morphine which they contained. [2] Bamford agreed, and Palmer went up to his house with him and got the pills, and was present whilst they were made up, put into a pill-box, and directed. He took them away with him between seven and eight. Cook was well and comfortable all the evening; he had no bilious symptoms, no vomiting, and no diarrhœa.

[3] Towards eleven, Palmer came with a box of pills directed in Bamford's hand. He called Jones's attention to the goodness of the handwriting for a man of eighty. It was suggested by the prosecution that the reason for this was to impress Jones with the fact that the pills had been made up by Bamford. With reference to Smith's evidence, it is remarkable that Bamford on the second night sent the pills, not "between nine and ten," but at eleven. [3] Palmer pressed Cook to take the pills, which at first he refused to do, as they had made him so ill the night before. At last he did so, and immediately afterwards vomited. Jones and Palmer both examined to see whether the pills had been thrown up, and

[1] W. H. Jones, 62-3. [2] Bamford, 164-5. [3] W. H. Jones, 63-4.

they found that they had not. This was about eleven. Jones then had his supper, and went to bed in Cook's room about twelve. When he had been in bed a short time, perhaps ten minutes, Cook started up, and called out, "Doctor, get up; I am going to be ill; ring the bell for Mr. Palmer." He also said, "Rub my neck." The back of his neck was stiff and hard. [1] Mills ran across the road to Palmer's, and rang the bell. Palmer immediately came to the bedroom window, and said he would come at once. Two minutes afterwards he was in Cook's room, and said he had never dressed so quick in his life. He was dressed as usual. The suggestion upon this was that he had been sitting up expecting to be called.

[2] By the time of Palmer's arrival Cook was very ill. Jones, Elizabeth Mills, and Palmer were in the room, and [3] Barnes stood at the door. The muscles of his neck were stiff; he screamed loudly. Palmer gave him what he said were two ammonia pills. Immediately afterwards—too soon for the pills to have any effect—he was dreadfully convulsed. [4] He said, when he began to be convulsed, "Raise me up, or I shall "be suffocated." Palmer and Jones tried to do so, but could not, as the limbs were rigid. He then asked to be turned over, which was done. His heart began to beat weakly. Jones asked Palmer to get some ammonia to try to stimulate it. He fetched a bottle, and was absent about a minute for the purpose. When he came back, Cook was almost dead, and he died in a few minutes, quite quietly. The whole attack lasted about ten minutes. The body was twisted back into the shape of a bow, and would have rested on the head and heels, had it been laid on its back. [5] When the body was laid out it was very stiff. The arms could not be kept down by the sides till they were tied behind the back with tape. The feet also had to be tied, and the fingers of one hand were very stiff, the hand being clenched. This was about one A.M., half or three-quarters of an hour after the death.

Deferring for the present the inferences drawn by the medical men from these symptoms, I proceed to describe the subsequent occurrences. As soon as Cook was dead, [6] Jones

[1] Mills, 40. [2] W. H. Jones, 64. [3] Barnes, 56.
[4] W. H. Jones, 64-5. [5] Keeling, 84-5. [6] W. H. Jones, 66.

TRIALS.

went out to speak to the housekeeper, leaving Palmer alone with the body. When Jones left the room, he sent the servant [1] Mills in, and she saw Palmer searching the pockets of Cook's coat, and searching also under the pillow and bolster. [2] Jones shortly afterwards returned, and Palmer told him that, as Cook's nearest friend, he (Jones) ought to take possession of his property. He accordingly took possession of his watch and purse, containing five sovereigns and five shillings. He found no other money. Palmer said, "Mr. "Cook's death is a bad thing for me, as I am responsible for "£3,000 or £4,000; and I hope Mr. Cook's friends will not "let me lose it. If they do not assist me, all my horses will "be seized." The betting-book was mentioned. Palmer said, "It will be no use to any one," and added that it would probably be found.

[3] On Wednesday, 21st November, Mr. Wetherby, the London racing agent, who kept a sort of bank for sporting men, received from Palmer a letter inclosing a cheque for £350 against the amount of the Shrewsbury stakes (£381), which Wetherby was to receive for him. This cheque had been drawn on the Tuesday, about seven o'clock in the evening, under peculiar circumstances. [4] Palmer sent for Mr. Cheshire, the postmaster at Rugeley, telling him to bring a receipt-stamp, and when he arrived asked him to write out from a copy which he produced, a cheque by Cook on Wetherby. He said it was for money which Cook owed him, and that he was going to take it over for Cook to sign. Cheshire wrote out the body of the cheque, and Palmer took it away. [5] When Mr. Wetherby received the cheque, the stakes had not been paid to Cook's credit. He accordingly returned the cheque to Palmer, [6] to whom the prosecution gave notice to produce it at the trial. [7] It was called for, but not produced. This was one of the strongest facts against Palmer in the whole of the case. If he had produced the cheque, and if it had appeared to have been really signed by Cook, it would have shown that Cook, for some reason or other, had made over his stakes to Palmer, and this would have destroyed the

[1] Mills, 41-2. [2] W. H. Jones, 65-6. [3] Wetherby, 96.
[4] Cheshire, 95-6. [5] Wetherby, 96. [6] Boycott, 96. [7] 97.

strong presumption arising from Palmer's appropriation of the bets to his own purposes. In fact, it would have greatly weakened and almost upset the case as to motive. On the other hand, the non-production of the cheque amounted to an admission that it was a forgery; and, if that were so, Palmer was forging his friend's name for the purpose of stealing his stakes at the time when there was every prospect of his speedy recovery, which must result in the detection of the fraud. If he knew that Cook would die that night, this was natural. On any other supposition, it was inconceivable rashness.

[1] Either on Thursday, 22nd, or Friday, 23rd, Palmer sent for Cheshire again, and produced a paper which he said Cook had given to him some days before. The paper purported to be an acknowledgment that certain bills—the particulars of which were stated—were all for Cook's benefit, and not for Palmer's. The amount was considerable, as at least one item was for £1,000 and another for £500. This document purported to be signed by Cook, and Palmer wished Cheshire to attest Cook's execution of it, which he refused to do. This document was called for at the trial, and not produced. The same observations apply to it as to the cheque.

[2] Evidence was further given to show that Palmer, who, shortly before, had but £9 6*s.* at the bank, and had borrowed £25 to go to Shrewsbury, paid away large sums of money soon after Cook's death. [3] He paid Pratt £100 on the 24th; [4] he paid a farmer named Spilsbury £46 2*s.* with a Bank of England note for £50 on the 22nd; [5] and Bown, a draper, a sum of £60 or thereabouts, in two £50 notes, on the 20th. The general result of these money transactions is that Palmer appropriated to his own use all Cook's bets; that he tried to appropriate his stakes; and that, shortly before or just after his death, he was in possession of between £500 and £600, of which he paid Pratt £400, though very shortly before he was being pressed for money.

[6] On Wednesday, November 21st, Mr. Jones went up to London, and informed Mr. Stephens, Cook's stepfather, of his

[1] Cheshire, 97-8. [2] Strawbridge, 169. [3] Pratt, 167.
[4] Spilsbury, 169. [5] Armshaw, 168. [6] Stephens, 78—80.

TRIALS. stepson's death. Mr. Stephens went to Lutterworth, found a will by which Cook appointed him his executor, and then went on to Rugeley, where he arrived about the middle of the day on Thursday. He asked Palmer for information about Cook's affairs, and he replied, "There are £4,000 worth of bills out of his, and I am sorry to say my name is to them; but I have got a paper drawn up by a lawyer and signed by Mr. Cook to show that I never had any benefit from them." Mr. Stephens said that at all events he must be buried. Palmer offered to do so himself, and said that the body ought to be fastened up as soon as possible. The conversation then ended for the time. Palmer went out, and, without authority from Mr. Stephens, ordered a shell and a strong oak coffin.

[1] In the afternoon, Mr. Stephens, Palmer, Jones, and Mr. Bradford, Cook's brother-in-law, dined together; and after dinner Mr. Stephens desired Mr. Jones to fetch Cook's betting-book. Jones went to look for it, but was unable to find it. The betting-book had last been seen by the chambermaid Mills, who gave it to Cook in bed on the Monday night, when he took a stamp from a pocket at the end of it. [2] On hearing that the book could not be found, Palmer said it was of no manner of use. Mr. Stephens said he understood Cook had won a great deal of money at Shrewsbury, to which Palmer replied, "It's no use, I assure you; when a man dies, his bets "are done with." He did not mention the fact that Cook's bets had been paid to Herring on the Monday. Mr. Stephens then said that the book must be found, and Palmer answered that no doubt it would be. Before leaving the inn, Mr. Stephens went to look at the body, before the coffin was fastened, and observed that both hands were clenched. He returned at once to town, and went to his attorney. He returned to Rugeley on Saturday, the 24th, and informed Palmer of his intention to have a post-mortem examination, which took place on Monday, the 26th.

[3] The post-mortem examination was conducted in the presence of Palmer by Dr. Harland, [4] Mr. Devonshire, a medical student assisting Dr. Monkton, and Mr. Newton. The heart was contracted and empty. There were numerous

[1] Mills, 41. [2] Stephens, 81. [3] Harland, 85-6. [4] Devonshire, 92.

small yellowish white spots, about the size of mustard-seed, at the larger end of the stomach. The upper part of the spinal cord was in its natural state; the lower part was not examined till the 25th January, when certain granules were found. There were many follicles on the tongue, apparently of long standing. The lungs appeared healthy to Dr. Harland, but Mr. Devonshire thought that there was some congestion. Some points in Palmer's behaviour, both before and after the post-mortem examination, attracted notice. [1] Newton said that on the Sunday night he sent for him, and asked what dose of strychnine would kill a dog; Newton said a grain. He asked whether it would be found in the stomach, and what would be the appearance of the stomach after death. Newton said there would be no inflammation, and he did not think it would be found. Newton thought he replied, "It's all right," as if speaking to himself, and added that he snapped his fingers. [2] Whilst Devonshire was opening the stomach, Palmer pushed against him and part of the contents of the stomach was spilt. Nothing particular being found in the stomach, Palmer observed to Bamford, "They will not hang us yet." As they were all crowding together to see what passed, the push might have been an accident; and, as Mr. Stephens' suspicions were well known, the remark was natural, though coarse. [3] After the examination was completed, the intestines, &c., were put into a jar, over the top of which were tied two bladders. Palmer removed the jar from the table to a place near the door, and when it was missed said he thought it would be more convenient. When replaced, it was found that a slit had been cut through both the bladders.

[4] After the examination, Mr. Stephens and an attorney's clerk took the jars containing the viscera, &c., in a fly to Stafford. [5] Palmer asked the postboy if he was going to drive them to Stafford. The postboy said, "I believe I am." Palmer said, "Is it Mr. Stephens you are going to take?" He said, "I believe it is." Palmer said, "I suppose you are "going to take the jars?" He said, "I am." Palmer asked if he would upset them? He said, "I shall not." Palmer

[1] Newton, 73. [2] Harland, 88. Devonshire, 92. [3] Harland, 88. [4] Boycott, 93. [5] J. Myatt, 94.

TRIALS. said if he would there was a £10 note for him. He also said something about its being "a humbugging concern." Some confusion was introduced into this evidence by the cross-examination, which tended to show that Palmer's object was to upset Mr. Stephens and not the jars, but at last the post-boy (J. Myatt) repeated it as given above. Indeed, it makes little difference whether Palmer wished to upset Stephens or the jars, as they were all in one fly, and must be upset together if at all.

[1] Shortly after the post-mortem examination, an inquest was held before Mr. Ward, the coroner. It began on the 29th November and ended on the 5th December. On Sunday, 3rd December, Palmer asked Cheshire, the postmaster, "if he "had anything fresh?" Cheshire replied that he could not open a letter. Afterwards, however, he did open a letter from Dr. Alfred Taylor, who had analysed the contents of the stomach, &c., to Mr. Gardiner, the attorney for the prosecution, and informed Palmer that Dr. Taylor said in that letter that no traces of strychnia were found. Palmer said he knew they would not, and he was quite innocent. Soon afterwards Palmer wrote to Mr. Ward, suggesting various questions to be put to witnesses at the inquest, and saying that he knew Dr. Taylor had told Mr. Gardiner there were no traces of strychnia, prussic acid, or opium. A few days before this, on the 1st December, Palmer had sent Mr. Ward, as a present, a cod-fish, a barrel of oysters, a brace of pheasants, and a turkey. These circumstances certainly prove improper and even criminal conduct. Cheshire was imprisoned for his offence, and Lord Campbell spoke in severe terms of the conduct of the coroner; but a bad and unscrupulous man, as Palmer evidently was, might act in the manner described even though he was innocent of the particular offence charged.

[2] A medical book found in Palmer's possession had in it some MS. notes on the subject of strychnine, one of which was, "It kills by causing tetanic contraction of the respiratory "muscles." It was not suggested that this memorandum was made for any particular purpose. It was used merely to

[1] Cheshire, 97-8. Hatton, 98-9. As to the presents, Hawkes, 100. Stack, 106.

[2] Bergen, 100.

show that Palmer was acquainted with the properties and effects of strychnine. TRIALS.

This completes the evidence as to Palmer's behaviour before, at, and after the death of Cook. It proves beyond all question that, having the strongest possible motive to obtain at once a considerable sum of money, he robbed his friend of the whole of the bets paid to Herring on the Monday by a series of ingenious devices, and that he tried to rob him of the stakes; it raises the strongest presumption that he robbed Cook of the £300 which, as Cook supposed, were sent up to Pratt on the 16th, and that he stole the money which he had on his person, and had received at Shrewsbury; it proves that he forged his name the night before he died, and that he tried to procure a fraudulent attestation to another forged document relating to his affairs the day after he died. It also proves that he had every opportunity of administering poison to Cook, that he told repeated lies about his state of health, and that he purchased deadly poison, for which he had no lawful occasion, on two separate occasions, shortly before two paroxysms of a similar character to each other, the second of which deprived him of life.

The rest of the evidence was directed to prove that the symptoms of which Cook died were those of poisoning by strychnine, and that antimony, which was never prescribed for him, was found in his body. Evidence was also given in the course of the trial as to the state of Cook's health. It may be conveniently introduced here.

[1] At the time of his death, Cook was about twenty-eight years of age. Both his father and mother died young, and his sister and half-brother were not robust. He inherited from his father about £12,000, and was articled to a solicitor. Instead of following up that profession, he betook himself to sporting pursuits, and appears to have led a dissipated life. He suffered from syphilis, and was in the habit of occasionally consulting Dr. Savage on the state of his health. [2] Dr. Savage saw him in November, 1854, in May, in June, towards the end of October, and again early in November, 1855, about a fortnight before his death, so that he had ample means of

[1] Stephens, 78. [2] Savage, 70-71.

TRIALS.

giving satisfactory evidence on the subject, especially as he examined him carefully whenever he came. Dr. Savage said that he had two shallow ulcers on the tongue corresponding to bad teeth, that he had also a sore throat, one of his tonsils being very large, red, and tender, and the other very small. Cook himself was afraid that these symptoms were syphilitic, but Dr. Savage thought decidedly that they were not. He also noticed "an indication of pulmonary affection under the "left lung." Wishing to get him away from his turf associates, Dr. Savage recommended him to go abroad for the winter. His general health Dr. Savage considered good for a man who was not robust. [1] Mr. Stephens said that when he last saw him alive he was looking better than he had looked for some time, and on his remarking, "You do not look anything of an invalid now," Cook struck himself on the breast, and said he was quite well. [2] His friend, Mr. Jones, also said that his health was generally good, though he was not very robust, and that he both hunted and played at cricket.

On the other hand, witnesses were called for the prisoner who gave a different account of his health. [3] A Mr. Sargent said he was with him at Liverpool a week before the Shrewsbury races, that he called his attention to the state of his mouth and throat, and the back part of his tongue was in a complete state of ulcer. "I said," added the witness, "I was "surprised he could eat and drink in the state his mouth was "in. He said he had been in that state for weeks and months, "and now he did not take notice of it." This was certainly not consistent with Dr. Savage's evidence.

Such being the state of health of Cook at the time of his death, the next question was as to its cause. The prosecution contended that the symptoms which attended it proved that he was poisoned by strychnia. Several eminent physicians and surgeons—Mr. Curling, Dr. Todd, Sir Benjamin Brodie, Mr. Daniel, and Mr. Solly—gave an account of the general character and causes of the disease of tetanus. [4] Mr. Curling said that tetanus consists of spasmodic affection of the voluntary muscles of the body which at last end in death, produced

[1] Stephens, 78. [2] W. H. Jones, 62. [3] Sargent, 269. [4] Curling, 110-111.

either by suffocation caused by the closing of the windpipe, or by the wearing effect of the severe and painful struggles which the muscular spasms produce. Of this disease there are three forms—Idiopathic tetanus, which is produced without any assignable external cause; traumatic tetanus, which results from wounds; and the tetanus which is produced by the administration of strychnia, bruchsia, and nux vomica, all of which are different forms of the same poison. Idiopathic tetanus is a very rare disease in this country. [1] Sir Benjamin Brodie had seen only one doubtful case of it. [2] Mr. Daniel, who for twenty-eight years was surgeon to the Bristol Hospital, saw only two. [3] Mr. Nunneley, professor of surgery at Leeds, had seen four. In India, however, it is comparatively common: [4] Mr. Jackson, in twenty-five years' practice there, saw about forty cases. It was agreed on all hands that though the exciting cause of the two diseases is different their symptoms are the same. They were described in similar terms by several of the witnesses. [5] Dr. Todd said the disease begins with stiffness about the jaw, the symptoms then extend themselves to the other muscles of the trunk and body. They gradually develop themselves. When once the disease has begun, there are remissions of severity, but not complete intermissions of the symptoms. In acute cases the disease terminates in three or four days. In chronic cases it will go on for as much as three weeks. There was some question as to what was the shortest case upon record. In a case mentioned by one of the prisoner's witnesses, [6] Mr. Ross, the patient was said to have been attacked in the morning, either at eleven or some hours earlier, it did not clearly appear which, and to have died at half-past seven in the evening. This was the shortest case specified on either side, though its duration was not accurately determined. As a rule, however, tetanus, whether traumatic or idiopathic, was said to be a matter, not of minutes or even of hours, but of days.

Such being the nature of tetanus, traumatic and idiopathic, four questions arose. Did Cook die of tetanus? Did he die of traumatic tetanus? Did he die of idiopathic tetanus? Did

[1] Brodie, 120. [2] Daniel, 121. [3] Nunneley, 215. [4] Jackson, 161.
[5] Todd, 113. Compare Sir B. Brodie, 119-20. [6] Ross, 239.

TRIALS.

he die of the tetanus produced by strychnia? The case for the prosecution upon these questions was, first, that he did die of tetanus. [1] Mr. Curling said no doubt there was spasmodic action of the muscles (which was his definition of tetanus) in Cook's case; and even [2] Mr. Nunneley, the principal witness for the prisoner, who contended that the death of Cook was caused neither by tetanus in its ordinary forms nor by the tetanus of strychnia, admitted that the paroxysm described by Mr. Jones was "very like" the paroxysm of tetanus. The close general resemblance of the symptoms to those of tetanus was indeed assumed by all the witnesses on both sides, as was proved by the various distinctions which were stated on the side of the Crown between Cook's symptoms and those of traumatic and idiopathic tetanus, and on the side of the prisoner between Cook's symptoms and the symptoms of the tetanus of strychnia. It might, therefore, be considered to be established that he died of tetanus in some form or other.

The next point asserted by the prosecution was, that he did not die of traumatic or idiopathic tetanus, because there was no wound on his body, and also because the course of the symptoms was different. They further asserted that the symptoms were those of poison by strychnia. Upon these points the evidence was as follows:—[3] Mr. Curling was asked. "*Q.* Were the symptoms consistent with any form of trau-"matic tetanus which has ever come under your knowledge "or observation?" He answered, "No."

"*Q.* What distinguished them from the cases of traumatic "tetanus which you have described? *A.* There was the "sudden onset of the fatal symptoms. In all cases that have "fallen under my notice the disease has been preceded by the "milder symptoms of tetanus. *Q.* Gradually progressing to "their complete development, and completion, and death? "*A.* Yes." He also mentioned "the sudden onset and rapid "subsidence of the spasms" as inconsistent with the theory of either traumatic or idiopathic tetanus; and he said he had never known a case of tetanus which ran its course in less than eight or ten hours. In the one case which occupied so

[1] Curling, 109-111. [2] Nunneley, 227. [3] Curling, 110-111.

short a time, the true period could not be ascertained. In general, the time required was from one to several days. Sir [1] Benjamin Brodie was asked, "In your opinion, are the "symptoms those of traumatic tetanus or not?" He replied, "As far as the spasmodic contraction of the muscles goes, the "symptoms resemble those of traumatic tetanus; as to the "course which the symptoms took, that was entirely dif-"ferent." He added, "The symptoms of traumatic tetanus "always begin, as far as I have seen, very gradually, the "stiffness of the lower jaw being, I believe, the symptom "first complained of—at least, so it has been in my experi-"ence; then the contraction of the muscles of the back is "always a later symptom, generally much later; the muscles "of the extremities are affected in a much less degree than "those of the neck and trunk, except in some cases where "the injury has been in a limb and an early symptom has "been a contraction of the muscles of that limb. I do not "myself recollect a case in which in ordinary tetanus there "was that contraction of the muscles of the hand which I "understand was stated to have existed in this instance. The "ordinary tetanus rarely runs its course in less than two or "three days, and often is protracted to a much longer period; "I know one case only in which the disease was said to "have terminated in twelve hours." He said, in conclusion, "I never saw a case in which the symptoms described arose "from any disease; when I say that, of course I refer not to "the particular symptoms, but to the general course which "the symptoms took." [2] Mr. Daniel, being asked whether the symptoms of Cook could be referred to idiopathic or traumatic tetanus, said, "In my judgment they could not." He also said that he should repeat Sir Benjamin Brodie's words if he were to enumerate the distinctions. [3] Mr. Solly said that the symptoms were not referable to any disease he ever witnessed, and [4] Dr. Todd said, "I think the symptoms were "those of strychnia." The same opinion was expressed with equal confidence by [5] Dr. Alfred Taylor, [6] Dr. Rees, and [7] Mr. Christison.

TRIALS.

[1] Brodie, 119-20. [2] Daniel, 121. [3] Solly, 123. [4] Todd, 116. [5] Taylor, 110. [6] Rees, 155. [7] Christison, 159.

TRIALS.

In order to support this general evidence, witnesses were called who gave accounts of three fatal cases of poisoning by strychnia, and of one case in which the patient recovered. [1] The first of the fatal cases was that of Agnes French, or Senet, who was accidentally poisoned at Glasgow Infirmary, in 1845, by some pills which she took, and which were intended for a paralytic patient. According to the nurse, the girl was taken ill three-quarters of an hour, according to one of the physicians (who, however, was not present), twenty minutes, after she swallowed the pills. She fell suddenly back on the floor; when her clothes were cut off she was stiff, "just like a poker," her arms were stretched out, her hands clenched; she vomited slightly; she had no lockjaw; there was a retraction of the mouth and face, the head was bent back, the spine curved. She went into severe paroxysms every few seconds, and died about an hour after the symptoms began. She was perfectly conscious. The heart was found empty on examination.

[2] The second case described was that of Mrs. Serjeantson Smyth, who was accidentally poisoned at Romsey in 1848, by strychnine put into a dose of ordinary medicine instead of salicine. She took the dose about five or ten minutes after seven; in five or ten minutes more the servant was alarmed by a violent ringing of the bell. She found her mistress leaning on a chair, went out to send for a doctor, and on her return found her on the floor. She screamed loudly. She asked to have her legs pulled straight and to have water thrown over her. A few minutes before she died she said, "Turn me over;" she was turned over, and died very quietly almost immediately. The fit lasted about an hour. The hands were clenched, the feet contracted, and on a postmortem examination the heart was found empty.

[3] The third case was that of Mrs. Dove, who was poisoned at Leeds by her husband ([4] for which he was afterwards hung), in February, 1856. She had five attacks on the Monday,

[1] Dr. Corbett, 124. Dr. Watson, 125. Dr. Patterson, 126. Mary Kelly (nurse), 126.

[2] Caroline Hickson, 127. W. F. Taylor (surgeon), 128. R. Broxam (chemist), 129. [3] J. Williams, 129. Mr. Morley, 130.

[4] See the next case for an account of his trial.

Wednesday, Thursday, Friday, and Saturday of the week beginning February 24th. She had prickings in the legs and twitchings in the hands; she asked her husband to rub her arms and legs before the spasms came on, but when they were strong she could not bear her legs to be touched. The fatal attack in her case lasted two hours and a half. The hands were semi-bent, the feet strongly arched. The lungs were congested, the spinal cord was also much congested. The head being opened first, a good deal of blood flowed out, part of which might flow from the heart.

TRIALS.

[1] The case in which the patient recovered was that of a paralytic patient of Mr. Moore's. He took an overdose of strychnia, and in about three-quarters of an hour Mr. Moore found him stiffened in every limb. His head was drawn back; he was screaming and "frequently requesting that we "should turn him, move him, rub him." His spine was drawn back. He snapped at a spoon with which an attempt was made to administer medicine, and was perfectly conscious during the whole time.

[2] Dr. Taylor and Dr. Owen Rees examined Cook's body. They found no strychnia, but they found antimony in the liver, the left kidney, the spleen, and also in the blood.

The case for the prosecution upon this evidence was that the symptoms were those of tetanus, and of tetanus produced by strychnia. The case for the prisoner was, first, that several of the symptoms observed were inconsistent with strychnia; and, secondly, that all of them might be explained on other hypotheses. Their evidence was given in part by their own witnesses and in part by the witnesses for the Crown in cross-examination. The replies suggested by the Crown were founded partly on the evidence of their own witnesses given by way of anticipation, and partly by the evidence elicited from the witnesses for the prisoner on cross-examination.

The first and most conspicuous argument on behalf of the prisoner was that the fact that no strychnia was discovered by Dr. Taylor and Dr. Rees was inconsistent with the theory that any had been administered. The material part of Dr.

[1] Mr. Moore, 133. [2] A. S. Taylor, 138-9. Rees, 154-5.

TRIALS.

Taylor's evidence upon this point was that he had examined the stomach and intestines of Cook for a variety of poisons, strychnia among others, without success. The contents of the stomach were gone, though the contents of the intestines remained, and the stomach itself had been cut open from end to end, and turned inside out, and the mucous surface, on which poison, if present, would have been found, was rubbing against the surface of the intestines. [1] This Dr. Taylor considered a most unfavourable condition for the discovery of poison, [2] and Mr. Christison agreed with him. Several of the prisoner's witnesses, on the contrary—[3] Mr. Nunneley, [4] Dr. Letheby, and [5] Mr. Rogers—thought that it would only increase the difficulty of the operation and not destroy its chance of success.

Apart from this, Dr. Taylor expressed his opinion that, from the way in which strychnia acts, it might be impossible to discover it even if the circumstances were favourable. The mode of testing its presence in the stomach is to treat the stomach in various ways, until at last a residue is obtained which, upon the application of certain chemical ingredients, changes its colour if strychnia is present. All the witnesses agreed that strychnia acts by absorption—that is, it is taken up from the stomach by the absorbents, thence it passes into the blood, thence into the solid part of the body, and at some stage of its progress causes death by its action on the nerves and muscles. Its noxious effects do not begin till it has left the stomach. From this Dr. Taylor argued that, if a minimum dose were administered, none would be left in the stomach at the time of death, and therefore none could be discovered there. He also said that, if the strychnia got into the blood before examination, it would be diffused over the whole mass, and so no more than an extremely minute portion would be present in any given quantity. If the dose were half a grain, and there were twenty-five pounds of blood in the body, each pound of blood would contain only one-fiftieth of a grain. He was also of opinion that the strychnia undergoes some chemical change by reason of which

[1] A. S. Taylor, 139. [2] Christison, 159. [3] Nunneley, 222. [4] Letheby, 235. [5] Rogers, 233.

its presence in small quantites in the tissues cannot be detected. In short, the result of his evidence was, that if a minimum dose were administered, it was uncertain whether strychnia would be present in the stomach after death, and that if it was not in the stomach, there was no certainty that it could be found at all. [1] He added, that he considered the colour test fallacious, because the colours might be produced by other substances.

[2] Dr. Taylor further detailed some experiments which he had tried upon animals jointly with Dr. Rees, for the purpose of ascertaining whether strychnia could always be detected. He poisoned four rabbits with strychnia, and applied the tests for strychnia to their bodies. In one case, where two grains had been administered at intervals, he obtained proof of the presence of strychnia both by a bitter taste and by the colour. In a case where one grain was administered, he obtained the taste but not the colour. In the other two cases, where he administered one grain and half a grain respectively, he obtained no indications at all of the presence of strychnia. These experiments proved to demonstration that the fact that *he* did not discover strychnia did not prove that no strychnia was present in Cook's body; and as this was the only way in which the non-discovery of strychnia was material to the case, great part of the evidence given on behalf of the prisoner became superfluous. It ought, however, to be noticed, as it formed a very prominent feature in the case.

[3] Mr. Nunneley, [4] Mr. Herapath, [5] Mr. Rogers, [6] Dr. Letheby, and [7] Mr. Wrightson, contradicted Dr. Taylor and Dr. Rees upon this part of their evidence. They denied the theory that strychnine undergoes any change in the blood, and they professed their own ability to discover its presence even in most minute quantities in any body into which it had been introduced, and their belief that the colour tests were satisfactory. Mr. Herapath said that he had found strychnine in the blood and in a small part of the liver of a dog poisoned by it; and he also said that he could detect the fifty-thousandth

[1] A. S. Taylor, 138-9. [2] A. S. Taylor, 138; Rees, 154.
[3] Nunneley, 222. [4] Herapath, 230-1. [5] Rogers, 532.
[6] Letheby, 233-4. [7] Wrightson, 241.

TRIALS. part of a grain if it were unmixed with organic matter. Mr. Wrightson (who was highly complimented by Lord Campbell for the way in which he gave his evidence) also said that he should expect to find strychnia if it were present, and that he had found it in the tissues of an animal poisoned by it.

Here, no doubt, there was a considerable conflict of evidence upon a point of which it was very difficult for unscientific persons to pretend to have any opinion. The controversy, however, was foreign to the merits of the case, inasmuch as the evidence given for the prisoner tended to prove not that there was no strychnia in Cook's body, but that Dr. Taylor ought to have found it if there was. In other words, it was relevant not so much to the guilt or innocence of the prisoner, as to the question whether Mr. Nunneley and Mr. Herapath were or were not better analytical chemists than Dr. Taylor. The evidence could not even be considered relevant as shaking Dr. Taylor's credit, for no part of the case rested on his evidence except the discovery of the antimony, as to which he was corroborated by Mr. Brande, and was not contradicted by prisoner's witnesses. His opinion as to the nature of Cook's symptoms was shared by many other medical witnesses of the highest eminence, whose credit was altogether unimpeached. The prisoner's counsel were placed in a curious difficulty by this state of the question. They had to attack and did attack Dr. Taylor's credit vigorously, for the purpose of rebutting his conclusion that Cook might have been poisoned by strychnine; yet they had also to maintain his credit as a skilful analytical chemist, for if they destroyed it, the fact that he did not find strychnine went for nothing. This dilemma was fatal. To admit his skill was to admit their client's guilt. To deny it was to destroy the value of nearly all their own evidence, which, in reality, was for the most part irrelevant. The only possible course was to admit his skill and deny his good faith, but this, too, was useless, for the reason just mentioned.

Another argument used on behalf of the prisoner was, that some of the symptoms of Cook's death were inconsistent with poisoning by strychnine. [1] Mr. Nunneley and [2] Dr. Letheby

[1] Nunneley, 221. [2] Letheby, 234.

thought that the facts that Cook sat up in bed when the attack came on, that he moved his hands, and swallowed, and asked to be rubbed and moved, showed more power of voluntary motion than was consistent with poisoning by strychnia. But Mrs. Serjeantson Smyth got out of bed and rang the bell, and both she, Mrs. Dove, and Mr. Moore's patient begged to be rubbed and moved before the spasms came on. Cook's movements were before the paroxysm set in, and the first paroxysm ended his life.

TRIALS.

[1] Mr. Nunneley referred to the fact that the heart was empty, and said that, in his experiments, he always found that the right side of the heart of the poisoned animals was full.

Both in Mrs. Smyth's case, however, and in that of the girl Senet, the heart was found empty; [2] and in Mrs. Smyth's case the chest and abdomen were opened first, so that the heart was not emptied by the opening of the head. [3] Mr. Christison said that if a man died of spasms of the heart, the heart would be emptied by them, and would be found empty after death; so that the presence or absence of the blood proved nothing.

[4] Mr. Nunneley and [5] Dr. Letheby also referred to the length of time before the symptoms appeared, as inconsistent with poisoning by strychnine. The time between the administration of the pills and the paroxysm was not accurately measured; it might have been an hour, or a little less or more; but the poison, if present at all, was administered in pills, which would not begin to operate till they were broken up, and the rapidity with which they would be broken up would depend upon the materials of which they were made. Mr. Christison said that if the pills were made up with resinous materials, such as are within the knowledge of every medical man, their operation would be delayed. He added: [6] "I do not think we can fix, with our present knowledge, the "precise time for the poison beginning to operate." [7] According to the account of one witness in Agnes French's case, the poison did not operate for three-quarters of an hour, though, probably, her recollection of the time was not very

[1] Nunneley, 220. [2] F. Taylor, 128-9. [3] Christison, 159.
[4] Nunneley, 219. [5] Letheby, 233. [6] Christison, 158.
[7] Mary Kelly, 126.

TRIALS.

accurate after ten years. [1] Dr. Taylor also referred (in cross-examination) to cases in which an hour and a-half, or even two hours, elapsed, before the symptoms showed themselves.

These were the principal points, in Cook's symptoms, said to be inconsistent with the administration of strychnia. All of them appear to have been satisfactorily answered. Indeed, the inconsistency of the symptoms with strychnia was faintly maintained. The defence turned rather on the possibility of showing that they were consistent with some other disease.

In order to make out this point, various suggestions were made in the cross-examination of the different witnesses for the Crown. It was frequently suggested that the case was one of traumatic tetanus, caused by syphilitic sores; but to this there were three fatal objections. In the first place, there were no syphilitic sores; in the second place, no witness for the prisoner said that he thought that it was a case of traumatic tetanus; and, in the third place, several doctors of great experience in respect of syphilis—especially [2] Dr. Lee, the physician to the Lock Hospital—declared that they never heard of syphilitic sores producing tetanus. [3] Two witnesses for the prisoner were called to show that a man died of tetanus who had sores on his elbow and elsewhere which were possibly syphilitic; but it did not appear whether he had rubbed or hurt them, and Cook had no symptoms of the sort.

Another theory was, that the death was caused by general convulsions. This was advanced by [4] Mr. Nunneley; but he was unable to mention any case in which general convulsions had produced death without destroying consciousness. [5] He said vaguely he had heard of such cases, but had never met with one. [6] Dr. McDonald, of Garnkirk, near Glasgow, said that he considered the case to be one of "epileptic convulsions "with tetanic complications." But he also failed to mention an instance in which epilepsy did not destroy consciousness. This witness assigned the most extraordinary reasons for supposing that it was a case of this form of epilepsy. He said that the fit might have been caused by sexual excitement, though the man was ill at Rugeley for nearly a week before

[1] A. S. Taylor, 150. [2] Lee, 124. [3] Dr. Corbett, 239. Mr. Mantell, 241.
[4] Nunneley, 227. [5] Nunneley, 217-8. [6] McDonald, 252-3.

his death; [1] and that it was within the range of possibility that sexual intercourse might produce a convulsion fit after an interval of a fortnight.

Both Mr. Nunneley and Dr. McDonald were cross-examined with great closeness. Each of them was taken separately through all the various symptoms of the case, and asked to point out how they differed from those of poisoning by strychnia, and what were the reasons why they should be supposed to arise from anything else. After a great deal of trouble, Mr. Nunneley was forced to admit that the symptoms of the paroxysm were "very like" those of strychnia, and that the various predisposing causes which he mentioned as likely to bring on convulsions could not be shown to have existed. He said, for instance, that excitement and depression of spirits might predispose to convulsions; but the only excitement under which Cook had laboured was on winning the race a week before; and as for depression of spirits, he was laughing and joking with Mr. Jones a few hours before his death. Dr. McDonald was equally unable to give a satisfactory explanation of these difficulties. It is impossible, by any abridgment, to convey the full effect which these cross-examinations produced. They deserve to be carefully studied by any one who cares to understand the full effect of this great instrument for the manifestation not merely of truth, but of accuracy and fairness.

Of the other witnesses for the prisoner, [2] Mr. Herapath admitted that he had said that he thought that there was strychnine in the body, but that Dr. Taylor did not know how to find it. He added that he got this impression from newspaper reports; but it did not appear that they differed from the evidence given at the trial. [3] Dr. Letheby said that the symptoms of Cook were irreconcilable with everything that he was acquainted with—strychnia poison included. He admitted, however, that they were not inconsistent with what he had heard of the symptoms of Mrs. Serjeantson Smyth, who was undoubtedly poisoned by strychnine. [4] Mr. Partridge was called to show that the case might be one of arachnitis, or inflammation of one of the membranes of the

[1] McDonald, 253-4. [2] Herapath, 231. [3] Letheby, 237. [4] Partridge, 244-5.

TRIALS. spinal cord, caused by two granules discovered there. In cross-examination he instantly admitted, with perfect frankness, that he did not think the case one of arachnitis, as the symptoms were not the same. Moreover, on being asked whether the symptoms described by Mr. Jones were consistent with poisoning by strychnia, he said, "Quite"; and he concluded by saying that, in the whole course of his experience and knowledge, he had never seen such a death proceed from natural causes. [1] Dr. Robinson, from Newcastle, was called to show that tetanic convulsions preceded by epilepsy were the cause of death. He, however, expressly admitted in cross-examination that the symptoms were consistent with strychnia, and that some of them were inconsistent with epilepsy. He said that, in the absence of any other cause, if he "put aside "the hypothesis of strychnia," he would ascribe it to epilepsy; and that he thought the granules in the spinal cord might have produced epilepsy. The degree of importance attached to these granules by different witnesses varied. Several of the witnesses for the Crown considered them unimportant. [2] The last of the prisoner's witnesses was Dr. Richardson, who said the disease might have been angina pectoris. He said, however, that the symptoms of angina pectoris were so like those of strychnine that he should have great difficulty in distinguishing them from each other.

The fact that antimony was found was never seriously disputed, nor could it be denied that its administration would account for all the symptoms of sickness, &c., which occurred during the week before Cook's death. No one but the prisoner could have administered it.

I was present throughout the greater part of this celebrated trial, and it made an impression on my mind which the experience of twenty-six subsequent years, during which I have witnessed, studied, and taken part in many important cases, has rather strengthened than weakened. It is impossible to give an adequate idea of the manner in which it exhibited in its very best and strongest light the good side of English criminal procedure. No more horrible villain than Palmer ever stood in a dock. The prejudice against him was

[1] Robinson, 258-9. [2] Richardson, 252-260.

so strong that it was considered necessary to pass an act of parliament to authorize his trial in London. He was actually indicted for the murder of his wife, and for that of his brother, and it was commonly reported at the time that he had murdered in the same way many other persons. Under the French system, the *acte d'accusation* would have paraded these, with all the other discreditable incidents of his life, before the eyes of the jury. He would have been questioned by the president, probably for days, about them; and it would have been practically impossible for the jury to consider, calmly and impartially, whether the fact that he had murdered Cook was properly proved. As it was, no one of these matters was introduced or referred to, except so far as it directly bore upon the case of Cook. Thus, Mrs. Palmer's death and the way in which he disposed of the £13,000 for which he had insured her life, were referred to only in order to show his money position at the time of Cook's death. The suggestion that he had murdered his wife (as he most unquestionably had) was never made or hinted at. So the fact that on Walter Palmer's death the policy for which Palmer had insured his life was disputed by the office was referred to only for the same purpose, and the same remark applies to the forged acceptances of his mother's which Palmer had uttered. The evidence on all these matters was confined to what was absolutely necessary for the purpose of showing motive.

Not less remarkable than the careful way in which all topics of prejudice were avoided was the extreme fulness and completeness of the evidence as to facts which were really relevant to the case. Nothing was omitted which the jury could properly want to know, nor anything which the prisoner could possibly wish to say. No case could set in a clearer light the advantage of two characteristic features of English criminal law, namely, its essentially litigious character, and the way in which it deals with scientific evidence. A study of the case will show, first, that evidence could not be more condensed, more complete, more closely directed to the very point at issue; secondly, that the subjection of all witnesses, and especially of all skilled witnesses, to the most rigorous cross-examination is absolutely essential to

TRIALS.

the trustworthiness of their evidence. The closeness and the skill with which the various witnesses, especially those for the defence, were cross-examined and compelled to admit that they could not really distinguish the symptoms of Cook from those of poisoning by strychnine was such an illustration of the efficiency of cross-examination as is rarely indeed afforded.

The defence was by far the least impressive part of the trial, but that was mainly because there was in reality nothing to say. It was impossible to suggest any innocent explanation of Palmer's conduct. It was proved to demonstration that he was in dire need of money in order to avoid a prosecution for forgery, that he robbed his friend of all he had by a series of devices which he must instantly have discovered if he had lived, that he provided himself with the means of committing the murder just before Cook's death, and that he could neither produce the poison he had bought nor suggest any innocent reason for buying it. There must have been some mystery in the case which was never discovered. Palmer, at and before his execution, was repeatedly pressed to say whether he was guilty or not, and was told that every one would believe him to admit his guilt if he did not emphatically deny it. He would say only, "He "was not poisoned with strychnine;" and I have reason to know that he was anxious that Dr. Herapath should examine the body for strychnine, though aware that he said he could detect the fifty-thousandth part of a grain. He may have discovered some way of administering it which would render discovery impossible, but it is difficult to doubt that he used it, for, if not, why did he buy it?

I am tempted to make one other observation on Palmer's case. His career supplied one of the proofs of a fact which many kind-hearted people seem to doubt, namely, the fact that such a thing as atrocious wickedness is consistent with good education, perfect sanity, and everything, in a word, which deprives men of all excuse for crime. Palmer was respectably brought up; apart from his extravagance and vice, he might have lived comfortably enough. He was a model of physical health and strength, and was courageous, determined,

and energetic. No one ever suggested that there was even a disposition towards madness in him; yet he was as cruel, as treacherous, as greedy of money and pleasure, as brutally hard-hearted and sensual a wretch as it is possible even to imagine. If he had been the lowest and most ignorant ruffian that ever sprang from a long line of criminal ancestors, he could not have been worse than he was. He was by no means unlike Rush, Thurtell, and many other persons whom I have known. The fact that the world contains an appreciable number of wretches, who ought to be exterminated without mercy when an opportunity occurs, is not quite so generally understood as it ought to be, and many common ways of thinking and feeling virtually deny it.

[1] THE CASE OF WILLIAM DOVE.

TRIALS.

On the 16th July, 1856, William Dove was indicted at York for the murder of his wife, Harriet Dove, and, after a trial before Baron Bramwell which occupied four days, was convicted. His case is remarkable as an illustration of the practical application of the principles of law relating to the criminal responsibility of madmen discussed in a preceding chapter.

Dove was a man of about thirty, and had been married to his wife, at the time of her death, between four and five years. He had about £100 a year of his own, and lived with his wife at various places. At the time of her death (Saturday, March 1, 1856), they had been living at Leeds since a few days before the previous Christmas. A servant, Elizabeth Fisher, who lived with them for about a year before Mrs. Dove's death, proved that for some time they had lived very unhappily. He was often drunk and violent, and they had quarrels in consequence. On one occasion, he was so violent that the servant went out for help, and he threw a bottle at her on her return. Another time, the servant saw him holding Mrs. Dove with one hand and threatening to kill her with a knife which he had in the other. Afterwards, when she asked for a part of some money which he had got, he said "he would rather give "it to any one than her, and he would give her a pill that "would do for her." This made so much impression on Mrs. Dove, that she told the servant (in Dove's presence) that he

[1] This account is taken from the notes of Lord Bramwell, who was so kind as to lend them to me for the purpose. I have followed throughout their very words, though the form in which they are taken is of course at times elliptical, and though there are one or two obvious slips of the pen.

had said so; and also said to her, on the morning when she left their service, "Elizabeth, if I should die and you are "away at the time, it is my wish that you tell my friends to "have my body examined." Elizabeth Fisher went home on Tuesday, February 19th, and on the following Saturday (the 23rd) her mother, Anne Fisher, came to take her place. On the Monday, before breakfast, Mrs. Dove was quite well. After breakfast, she went up stairs to make the beds, and complained of feeling very strange. In a short time, symptoms came on which, no doubt, were those of poisoning by strychnine. The attack went off, but she remained in bed, and was attended by Mr. Morley, who was fetched for the purpose by Dove.

She had similar attacks on the Wednesday, the Thursday, and a very bad one on the Friday night. Through the early part of Saturday (March 1) she was better, but, about half-past eight in the evening, another attack came on, and she died at about twenty minutes to eleven. A post-mortem examination made by Mr. Morley and Mr. Nunneley proved, beyond all doubt, that she had died of strychnine. Substances extracted from the body poisoned several animals, which died from symptoms identical with those which were produced in other animals poisoned with strychnine procured for the purpose elsewhere.

It was equally clear that the poison was administered with the intention of destroying life, with premeditation, and with precautions intended to conceal it. Mrs. Dove had been unwell, though not seriously, for some time before her death, and had been attended by Mr. Morley for about three months. Dove used to go to his surgery for medicines. "He came" (said Elletson, a pupil of Mr. Morley's) "a month before her "death. We talked about [1] Palmer's trial. He said Palmer "had poisoned his wife by repeated doses of antimony. It "was mentioned Cook had been poisoned by strychnine. "Dove said strychnine could not be detected after death. I "said it could. I mentioned nitric acid as a test. I showed "him the amount in Pereira's *Materia Medica*. He took it "in his hand and read it, page 903, &c. He said his house "was infested with wild cats, which he wished to destroy. He

[1] See last Case.

TRIALS.

"said he thought laying poison would be the best way. I "said I thought it would. He asked me for some strychnine. "I gave him some, about ten grains, wrapped as a powder in "a piece of foolscap paper. I wrote 'poison' on it." He afterwards got from three to five grains more in the same manner, and he was seen by Mr. Morley's coachman in the surgery when no one was there. As he had observed, in the course of his conversation with Elletson, the place where the strychnine bottle was kept, he had, on this occasion, an opportunity of obtaining a further supply if he chose. He did poison two cats with the strychnine thus obtained, and also a mouse, thus giving colour to his possession of the poison.

Besides the circumstances which showed that Dove lived on bad terms with his wife and had threatened her, evidence was given to show that he had formed designs upon her life. During her illness, he told Mrs. Thornhill, a widow, that he had been to the witchman, who said Mrs. Dove had not long to live. He added that, as soon as she died, he would make an offer to the lady next door. In the course of her illness, he repeatedly told Mr. Morley, the surgeon, that he thought she would not recover, notwithstanding Mr. Morley's opinion to the contrary. He also told a woman named Hicks that she would not get over the disease, and that he should most likely marry again, as no one could expect him, a young man, to remain single. He told the same witness, on the day of Mrs. Dove's death, that Mrs. Dove would not have another attack till half-past ten or eleven; and on being asked whether the attacks came on periodically made no answer. Lastly, on the evening of her death, he gave her a dose of medicine. She complained of the taste being very hot, and in about a quarter of an hour was seized with all the symptoms of strychnine poisoning which continued till her death.

Some other evidence upon the subject was given, but it is needless to go into it. It is enough to say that it was proved beyond the possibility of doubt on the part of the prosecution, whilst it was hardly denied on the part of the prisoner, that he caused her death by the repeated administration of doses of strychnine, which he had procured for that purpose under false pretences, and which he administered in order to destroy

her life, partly because he was on bad terms with her, partly because he wished to marry again. TRIALS.

The substantial defence which gives the case its interest was, that the act was either not wilful or not malicious; and the evidence of this was, that Dove was insane, and was thus either prevented by mental disease from knowing that the act was wrong, or constrained by an irresistible impulse to do it. The evidence as to the state of his mind was given partly by the witnesses for the prosecution, and partly by the witnesses called by his own counsel. The most convenient way of describing its effect will be to throw it into the shape of a continuous account of his life, from the sixth year of his age down to the time of his trial.

The first witness upon the subject was his nurse, who had known him from the sixth to about the twentieth year of his age. She said, "I never thought him right in his mind." The proof of this seemed to consist principally in his habit of playing exceedingly mischievous and ill-natured tricks. For example: he tried to set the bed-curtains on fire; he chased his sisters with a red-hot poker; he cut open a wound on his arm which had healed, saying it had healed false. The nurse added: "His father and family were very pious and regular "Wesleyans. Great pains were taken to instruct the child. "He could not regularly be taught his lessons and duties. "That is one reason for thinking he was not in his right "mind." Mr. Charles Harrison, who had been usher at a school where Dove was from ten to thirteen years of age, spoke of him as follows: "I regarded him as a youth of a very low "order of intellect. I never remember to have met with a "similar case—great imbecility of mind and great want of "moral power, [1] evil and vicious propensities." He added, that once Dove got a pistol, and told the boys that he meant to shoot his father with it. The father was told of it, and said he should flog him. In cross-examination, Mr. Harrison said: "He was a dull boy and a bad boy. I then thought "him insane. I did not feel myself in a position to object "to him being flogged. I never sent him from my class to "be flogged. He was frequently flogged for incapacity." Mr.

[1] *Sic* in the notes.

TRIALS.

Highley, the schoolmaster, spoke strongly of his bad conduct, and said: "His reasoning powers were extremely limited. "He appeared to have no idea of any consequences. He "appeared to be deprived of reason. I am satisfied he was "labouring under an aberration of intellect." These strong expressions, however, were not supported by any specific proof worth repeating. Mr. Highley admitted that he used to flog him, but he added: "I flogged him till I was satisfied there "was a want of reason, but not after." He admitted, however, that he flogged him slightly ("perhaps a stroke or two") the day before he left.

Dove having been expelled from Mr. Highley's school, his father took the opinion of Mr. Lord, who was also a schoolmaster, as to what was to be done with him. Mr. Lord said: "I, at his father's request, invited him into my study, to give "him religious instruction. I made myself acquainted with "the character of his mind. I could make no impression on "his heart or his head. He would not at all appreciate what "I said. He listened, but I could make no impression—get "no rational answer. His father consulted me as to what "provision [1] I should make for him. I advised him. He was "not then capable of disposing of property to any amount "rationally. I never forbade him my house. I did not invite "him in consequence of his deficiency and perverseness. I "should say he was not of sound mind." In cross-examination, Mr. Lord said that, when he heard of Dove's engagement, he told his future wife's brother that inquiry ought to be made about Dove, "on account of his unaccountable irrational con- "duct." In answer to further questions, he repeated several times his strong conviction of his being "irrational" in conversation and behaviour, though he could give no particular instance of it.

In consequence apparently, or at any rate soon after his reference to Mr. Lord, Dove's father sent him to a Mr. Frankish to learn farming. He stayed with Mr. Frankish for five years and a-half. Mr. Frankish said: "I think there "were certain seasons when he was not of sound mind. That "was frequent. He never could learn farming." He also

[1] *Sic.* Obviously it should be "he."

mentioned a number of instances of the sort of conduct on which this opinion was founded. Thus, he put vitriol on the tails of some cows. He at first denied, but afterwards confessed it, and was sorry for what he had done. He also burnt two half-grown kittens with vitriol. He put vitriol into the horse-trough, and set fire to the gorse on the farm, doing considerable damage. After leaving Frankish, he went for a year as a pupil to a Mr. Gibson, also a farmer. Gibson's account of him was as follows: "I did not consider him one of the brightest and "most powerful minds. I tried to teach him practically, as "far as farming went, as stock and the rotation of crops. I "was not as successful as I should like."

After this he seems to have gone to America, for what purpose does not appear. He went alone, and he seems not to have stayed there long; and he told wild stories about his adventures there on his return. He was next established on a farm taken for him at a place called Whitwell. It was about this time that he married. James Shaw, Mary Peek, and Robert and William Tomlinson, Emma Spence, and Emma and Fanny Wilson, who had been in his service, all gave evidence of his extravagant behaviour whilst he held the farm. He used to point loaded fire-arms at his servants, and threaten to shoot people who had given him no offence. He told strange stories about his having been attacked or followed by robbers. He cut a maid-servant's cap to pieces. He and his wife often quarrelled, and sometimes played like children. Some of the servants spoke of having seen him crying, wandering about his fields without an object. Shaw said: "I many "times used to think he did things different from what a man "would do if he had his right mind." Tomlinson said: "I do "not think he was a sound-minded man at all times." Several other witnesses—two schoolmasters, a postman, a Wesleyan preacher, who had lodged at his father's, and a friend of his wife's—all deposed to a variety of extravagant acts and conversations somewhat similar to those already stated. They spoke of his conversation as being unusually incoherent, "flying "about from one subject to another,"—of his lying on the ground and crying without a cause, of his complaining of noises in his house, and of his reaping part of his own corn

TRIALS. while it was green because, he said, others had reaped theirs and he would not be later than they, and of his telling wild stories about his adventures in America, as if he believed them. In addition to this, whilst he was in goal, he wrote in his own blood a letter to the devil. It was suggested that this might be for the purpose of making evidence of his insanity.

In addition to the evidence as to facts, three medical witnesses were called, who had been physicians to lunatic asylums or otherwise specially occupied with the subject of madness for many years. They all agreed in describing Dove as of unsound mind. Two of them, Dr. Pyeman Smith, proprietor of a lunatic asylum at Leeds, and Dr. Kitchen, of York, at once admitted, on cross-examination, that they thought he knew right from wrong during the week which he passed in poisoning his wife. Dr. Pyeman Smith added that many mad people do know right from wrong; that a mad man having that knowledge might be regardless of consequences, and might be wholly unable to refrain from doing what was wrong. He then said, "I cannot say that of the prisoner during "that week; circumstances might have made him refrain. "Other circumstances. Not the greater chance of detection. "His not possessing the poison. Slight circumstances might "have [? made] him defer it to another time. In my opinion "possessing [? the means] he was regardless of the conse- "quences." Mr. Kitchen said: "I think it probable that he "had some knowledge of the difference between right and "wrong during the fatal week. If he did it, I have no doubt "he knew he was committing murder, and that if found out "he would be likely to be punished for it." On re-examination, he added, "I consider his conduct that week the natural "consequence of what had gone before. All his previous life "justified the expectation. I believe he has been insane all "his life. When I say he knew if he did it he was commit- "ting murder, I mean he knew he was killing his wife. I "do not mean he knew he was doing wrong. I think he "would know that in proportion as he knew the difference "between right and wrong."

Dr. Williams, who had been medical attendant of a lunatic asylum at York for thirty years, gave evidence on the subject

at great length. The most important parts of his evidence are as follows: After stating his conviction that Dove's letter to the devil was genuine, and that he believed himself to be under supernatural influences, he said, "During the "fatal week, from all I have heard, I should say that, while "impelled by a propensity to injure or take life, his mind "was probably influenced by his notions regarding super-"natural agency, and therefore he was the subject of delusion. "A person labouring under such delusion might retain his "power of judging in adopting means to an end, and as to "consequences as regards the object he had in view. Under "those delusions he could not have the power of resisting "any impulse." On cross-examination, Dr. Williams said: "I know of no case of a man" (obviously meaning a man under the influence of madness) "giving poison in small and "repeated doses. Insanity to take away life by poison is "rare. If poison were administered six or seven times run-"ning, I should not call it an impulse; I should call it an "uncontrollable propensity to destroy, give pain, or take life. "The propensity might continue as a permanent condition of "the mind. It might select a special object and not injure "any body or thing else. I think such a person would not "know he was doing wrong. He might fear the consequences "of punishment. He would probably know that he was break-"ing the law. He would not know at the time he did it he "would be hanged for murder. I found that opinion on the "occupation of the mind by the insane propensity. It is "uncertain if he would know it before he did it. He might "afterwards."

After several questions pointing to the conclusion that vice as well as insanity might be the cause of crime in men so constituted, Dr. Williams was asked the following question: "If a person lived with his wife and hated her, and deter-"mined to and did kill her, what is the difference between "that determination which is vice and the propensity which "is insanity?" He answered: "The prisoner's previous his-"tory would be required to determine whether it was vice "or insanity." He then proceeded, in answer to other ques-tions: "A man by nourishing an idea may become diseased

TRIALS.

"in his mind, and then he cannot control it. This is moral "insanity. It does apply to other cases: it might apply to "rape; as, if a man nourished the desire to possess a particular "woman till the desire became uncontrollable, and then he "committed the rape, that would be moral insanity. So of "theft. If a man permits himself to contemplate the grati- "fication of any passion or desire till it becomes uncontrol- "lable, that is moral insanity." On re-examination, he gave the following evidence:—"[1] *Q.* Suppose the man had from his "childhood been excitable, used fire-arms when no danger, "threatened to shoot his father and mother, complained of "sounds in his house, and the other things proved by wit- "nesses yesterday, treating his wife kindly and weeping? "*A.* I have no doubt that man is insane, and not fit to be "trusted abroad. I would have certified him a lunatic before "the fatal week."

The jury returned the following verdict:—"Guilty, but we "recommend him to mercy on the ground of his defective "intellect." He was sentenced to death, and executed at York in pursuance of his sentence.

I have entered minutely into the details of this case, because it furnishes a perfect illustration of the state of mind which Erskine [2] alluded to, though it was unnecessary for him to discuss it minutely, in his celebrated speech on the trial of Hadfield. It is impossible to resist the conclusion, which the evidence given above suggests, that Dove was not a sane man. It is equally impossible to doubt that he wilfully, maliciously, and of his malice aforethought, in the full and proper sense of those words, murdered his wife. The result of the whole history appears to be, that he was from

[1] Verbatim from the Notes.

[2] "You will have to decide whether you attribute it wholly to mischief "and malice, or wholly to insanity or to the one mixing itself with the other." ". . . *If you consider it as conscious malice and mischief mixing itself with "insanity,* I leave him in the hands of the court to say how he is to be dealt "with. It is a question too difficult for me."—27 *State Trials,* 1328. This remark is characteristic of Erskine. The great logical capacity, which was one of the principal characteristics of his mind, led him to say that malice and insanity might mix. His excessive caution as an advocate admonished him to point to the difficulty and leave it on one side, but I know of nothing in his speeches or writings to lead to the supposition that he could have done much towards solving it had he tried.

infancy predisposed (to say the least) to madness; that symptoms indicating that disease displayed themselves at frequent intervals through the whole course of his life, but that they never reached such a pitch as to induce those about him to treat him as a madman. He was allowed to go by himself to America, to occupy and manage a farm, to marry, though his wife's brother was warned of his character, to live on his means without interference at Leeds, and generally to conduct himself as a sane person. This being so, he appears to have allowed his mind to dwell with a horrible prurience on the prospect of his wife's death and of his own marriage to another person, to have formed the design of putting her to death, and to have carried out that design with every mark of deliberate contrivance and precaution. In this state of things, can he be said to have known, in the wider sense of the words, that his act was wrong? He obviously knew that the act was wrong in the sense that people in general would so consider it; but was he capable of thinking like an ordinary man of the reasons why murder is wrong, and of applying those reasons to his conduct?

Undoubtedly there was evidence both ways. Looking at the whole account of his life, it cannot be denied that his language and conduct appear at times to have been inconsecutive, capricious, and not capable of being accounted for on any common principles of action. His lying down on the ground to cry, his wandering in the fields, the noises he supposed himself to hear, are all strong illustrations. On the other hand, this was only an occasional state of things. He appears to have acted, as a rule, rationally enough, and to have transacted all the common affairs of life. Did, then, this killing of his wife belong to the rational or to the irrational part of his conduct? Every circumstance connected with it referred it to the former. Its circumstances presented every conceivable mark of motive and design. It was a continued series of deliberate and repeated attempts, fully accomplished at last.

The suggestion of Dr. Williams, that Dove had allowed his mind to dwell on his wife's death till at last he became the victim of an uncontrollable propensity to kill her, if correct,

TRIALS.

would not prove that his act was not voluntary. It is the setting and keeping the mind in motion towards an object plainly conceived that constitutes the mental part of an act. Every act becomes irrevocable by the agent before it is consummated. If a man, for example, strikes another, he may repent while his arm is actually falling, but there is a point at which he can no more deprive his arm of the impetus with which he has animated it than he can divert from its course a bullet which he had fired from a rifle. Suppose he deals with his mind in this manner at an earlier stage of the proceeding, and so fills himself with a passionate, intense longing for the forbidden object, or result, that he becomes as it were a mere machine in his own hands. Is not the case precisely similar, and does not the action continue to be voluntary and wilful, although the act of volition which made it irrevocable preceded its completion by a longer interval than usual?

It must, however, be remembered that the proof that Dove's propensity was uncontrollable is very defective. An uncontrollable propensity which accidental difficulties, or the fear of detection, constantly control and divert for a time, is an inconceivable state of mind. Is there the smallest reason to suppose that, if Mrs. Dove had met with a fatal accident, and had been lying in bed dying before her husband gave her any poison at all, his uncontrollable propensity to kill her would have induced him to administer the poison nevertheless? If not, the propensity was like any other wicked feeling. It was certainly uncontrolled, and may probably have been strong, but that is different from being uncontrollable.

It is easy, no doubt, to imagine circumstances which would have justified the jury in returning a different verdict. If Dove had always treated his wife kindly, and lived on good terms with her, and if he had killed her in a sudden, unaccountable fury, the evidence as to the state of his mind would, no doubt, have suggested the conclusion that the act was not part of the regular and ordinary course of his life; that it was not planned, settled, and executed as rational men carry out their purposes, but that it was one of those occurrences which rebut the presumption of will or malice on the

part of the agent, and was, therefore, not within the province of the criminal law. This conclusion might have been rendered more or less probable by an infinite variety of collateral circumstances. Concealment, for example, would have diminished its probability. Openness would have increased it, and so would independent traces of excitement. Probably, if the suggestion made in an earlier part of this work were adopted, and if another case like Dove's occurred, the jury might find a verdict of "Guilty, but his powers of "self-control were weakened by disease." An acquittal on the ground of insanity would, I think, have been wrong.

[1] THE CASE OF THOMAS SMETHURST.

TRIALS.

THOMAS SMETHURST was indicted for the wilful murder of Isabella Bankes at the Old Bailey Sessions, on the 7th July, 1859. After the case had proceeded for a considerable time, one of the jury was taken ill, and the court adjourned till Monday, the 15th August. A trial, which occupied four days before the Lord Chief Baron of the Exchequer, then took place; the prisoner was convicted and sentenced to death, but he subsequently received a free pardon on the ground that his guilt had not been sufficiently proved.

Smethurst, who had been for many years married to a person much older than himself, was living with his wife, in November, 1858, at a boarding-house in Bayswater, where he became acquainted with Miss Bankes, the deceased. On the 9th of December he went through the ceremony of marriage with her, and they went to live together at Richmond, Smethurst's real wife being left at the boarding-house at Bayswater. There he visited her once or twice after he left, and he also transmitted money on her account to the mistress of the house. There was no evidence to show that Mrs. Smethurst was aware of the relations between her husband and Miss Bankes, though it is hardly possible that her suspicions should not have been roused by their leaving the house

[1] This account is founded on the notes of Lord Chief Baron Pollock, who was kind enough to lend them to me for that purpose, and also to give me a copy of his communication to Sir G. C. Lewis on the subject. The quotations of the evidence are taken from the Lord Chief Baron's notes. I have compared the Report in the 50th Volume of the Old Bailey Sessions Papers, and the references are to the pages of that volume.

within a fortnight of each other, [1] especially as Miss Bankes's departure was caused by the representations of the landlady as to the impropriety of her conduct.

After the sham marriage, the prisoner and the deceased went to live at Richmond, where they stayed for four months. [2] From the 4th February to the 15th April they lodged at Old Palace Gardens. From the 15th April to Miss Bankes's death, on the 3rd May, they lodged at 10, Alma Villas; Miss Bankes was taken ill towards the end of March, or beginning of April, and grew rapidly worse. [3] Dr. Julius, of Richmond, was called in on the 3rd of April, by the direction of the prisoner, on the recommendation of the landlady of the first set of lodgings. [4] In the midst of her illness Miss Bankes was removed to another lodging at 10, Alma Villas, the motive of the change being the raising of the rent of the first lodgings. [5] Dr. Bird, the partner of Dr. Julius, attended her from the 18th April, and by the prisoner's desire she was visited by Dr. Todd, on the 28th. [6] On Sunday, the 1st May, a will was made for Miss Bankes by a Richmond solicitor, named Senior, who was applied to on the subject by Dr. Smethurst, and by this will the whole of her property, with the exception of a brooch, was left to him absolutely. The property consisted of £1,740 lent on mortgage. [7] The deceased had, also, a life interest in £5,000, the dividend on which she had just received and handed to the prisoner. [8] On May 1st, being Sunday, the will was executed, and on May 2nd the prisoner was brought before the Richmond magistrates on a charge of administering poison to the deceased. [9] He was liberated on his own recognizances the same evening, and Miss Bankes died on the morning of the 3rd. [10] Her sister, Miss Louisa Bankes, had visited her on the 19th April. She also visited her on the 30th, and attended her from the time of Dr. Smethurst's liberation to her death. On the post-mortem examination, it appeared that the deceased was between five and seven weeks advanced in pregnancy. On the prisoner's second apprehension, which

[1] P. 504. [2] P. 505. [3] P. 505. [4] P. 530.
[5] P. 524. [6] Pp. 520-1. [7] Pp. 522, 547, 513.
[8] P. 545. [9] P. 513—517. [10] P. 539.

TRIALS.

took place immediately after the death of Miss Bankes, a letter was found upon him addressed to his real wife.

The first question suggested by these facts was whether they disclosed any motive on the part of the prisoner for the murder of the deceased.

The consequences of the death of Miss Bankes to Smethurst, measured in money, would be a gain of £1,740 lent on mortgage, and a loss of the chance of receiving the dividend to accrue on the principal sum of £5,000 during her life. His chance of receiving the dividend depended entirely on the continuance of their connection and of his influence over her. Now, the connection was one which involved not merely immorality, but crime. If Mrs. Smethurst had become aware of its character, she might at any moment have punished her husband's desertion and neglect by imprisonment; and, so long as the connection continued, his liberty and character were at the mercy of any one who might discover the circumstances bearing on it. There was also the chance that he himself might become tired of his mistress, or that she, from motives which might readily arise, might wish to leave him. His hold over her dividends would terminate in any of these cases, and was thus uncertain. Besides this, it must be remembered that the dividends, whilst he received them, would have to be applied to their joint support. He could not apply them to his own purposes and turn her out of doors, for, if he had done so, she would have retained them for herself. [1] A precarious hold over £150 a year, for the life of a person who was to be supported as a lady out of that sum, and who was likely to become a mother, was certainly not worth the right to receive a gross amount of £1,740, unfettered by any condition whatever. It thus seems clear that Smethurst had a money-interest in the death of Miss Bankes; but there is nothing to show that he was in pressing want of money, whilst there is some evidence to show that he was not. In Palmer's case the possession of a large sum of money at the very time of Cook's death was a matter of vital importance; but [2] Smethurst had a considerable

[1] The dividend was £71 5*s.*, probably for a half-year.
[2] P. 547.

balance at his banker's at the time in question, and appears to have lived upon his means at Richmond without any visible mode of earning a living.

A consideration which weighed more heavily, in respect to the existence of a motive for murder, arose out of the nature of the connection between the prisoner and the deceased. It is sometimes said that there is no need to look further for a motive when the parties are man and wife. The harshness of the expression ought not to be allowed to conceal the truth which it contains. Married people usually treat each other with external decency, good humour, and cordiality, but what lies under that veil is known only to themselves; and the relation may produce hatred, bitter in proportion to the intimacy which it involves. In the particular case in question, the relation which existed between the parties was one which could hardly fail to abound in sources of dislike and discomfort. Both were doing wrong; both (if Miss Bankes knew of Smethurst's first marriage) had committed a legal as well as a moral offence; and at the very period when the illness of the deceased commenced she had become pregnant.

To a man in Smethurst's position, that circumstance (if he were aware of it) would in itself furnish some motive for the crime with which he was charged, for the birth of a child could hardly have failed to increase the difficulties and embarrassments incidental to the position in which he had placed himself.

Some expressions occurred in a conversation between Miss Bankes and her sister, Miss Louisa Bankes, which have an important bearing on this part of the subject. Miss Louisa Bankes saw her sister for the first time after the ceremony of December 9th at Richmond, on the 19th April. Her evidence as to what passed was as follows: [1] "I was taken into the "deceased's bedroom. She was rather agitated. She said, "if I would be quiet it would be all right. He said, 'Yes, "'it would be all right.'" These expressions suggest a doubt whether Miss Bankes was fully aware of the true nature of her connection with Dr. Smethurst, and whether she may not

[1] P. 513.

TRIALS. have supposed that she was his lawful wife, though there was another person passing by the same name.

[1] If Smethurst had deceived her on this point, and if he was aware of her pregnancy, his position would be most distressing, and would explain a wish on his part to be freed from it at all hazards.

In opposition to this it must be observed that the will was executed in her maiden name, which implies a knowledge on her part that she was not married, though, as there is nothing to show that she had any particular acquaintance with business, and as the will was executed only forty-eight hours before she died of exhaustion, too much weight must not be attached to this. The letter found in Smethurst's pocket on his second arrest, and addressed to his wife, is deserving of attention in reference to this part of the subject. It was as follows :—

"K. W. C.
"Monday, May 2, 1859.

"MY DEAREST MARY,—I have not been able to leave for "town as I expected, in consequence of my medical aid being "required in a case of illness. I shall, however, see you as "soon as possible; and should any unforeseen event prevent "my leaving for town before the 11th, I will send you a cheque "for Smith's money and extras. I will send £5. I am quite "well, and sincerely hope you are the same, and that I shall "find you so when I see you, which I trust will not be long "first. Present my kind regards to the Smiths and all old "friends in the house. I heard from James the other day; "he said he had called on you, but that you had gone out for "a walk. With love,

"Believe me,
"Yours most affectionately,
"T. SMETHURST."

This letter contains several expressions which raise a doubt whether Mrs. Smethurst was aware of her husband's relations with Miss Bankes. Though the writer was staying at Richmond, the letter is dated, "K. W. C.," as if it had been written

[1] This suggestion was negatived by subsequent proceedings (see note, *post*).

at some place, the name of which began with a K., in the West Central district. It also appears as if Smethurst had arranged with his wife to "leave for town" before the 11th, and was intending to return to her; and there is an indistinctness and an incompleteness about the letter which looks as if it were one of a series, and as if Mrs. Smethurst had had reason to believe that her husband was absent from her only for a time and was shortly intending to return. If she had known of his connection with Miss Bankes, it is hardly conceivable that some explicit mention of her state should not have been made in the letter, as she died on the following day, and Smethurst had procured her will to be made on the Sunday (the day before), lest Monday should be too late. If Mrs. Smethurst was in correspondence with her husband, but did not know of his position, and had reason to expect his return, his relations with Miss Bankes would be most painful. This, however, is little more than conjecture.

The result of the inquiry into the question of motive would thus seem to be that Smethurst had a money-interest in Miss Bankes's death, but that he was not proved to be in any particular want of money; that their relation was one which may probably have caused enmity in various ways; that there is no proof, but that there are not unreasonable grounds for conjecturing, that it did so in point of fact.

Two points were urged against Smethurst at his trial arising out of his conduct. They were, that he had allowed no one to see Miss Bankes during her illness except himself and the medical men, and in particular that he prevented her sister from seeing her; and that he acted in a suspicious manner in relation to the preparation of her will. The evidence upon these points was as follows: [1] At the first set of lodgings, Miss Bankes was waited on by the landlady and her daughter; Smethurst went repeatedly to town, and Dr. Julius saw Miss Bankes in his absence; but this was not so at the second set of lodgings, where the deceased passed the last three weeks of her life. [2] During this period Smethurst waited on Miss Bankes himself, declining to employ a sick nurse on the ground that he could not afford it, though he

[1] Pp. 506-7. [2] P. 509.

TRIALS. had in his hands about £70, the amount of the dividend handed over to him by her. This in itself is remarkable, for the offices which it was necessary that he should render to her were not such as a man ought to discharge for a woman, if it is possible that they should be discharged by one of her own sex. His conduct towards Miss Louisa Bankes, it was argued, was of the same character. [1] He invited her to see her sister twice, but on neither occasion did he voluntarily leave them alone together, and he wrote four letters in the interval, in two of which he dissuaded her from repeating her visit on the ground that the doctors had prohibited it on account of the excitement produced by the first visit. [2] Dr. Julius said, "I never gave directions she should not see her sister. I "never heard the subject alluded to." [3] Dr. Bird said, "To "the best of my belief the prisoner mentioned the visit of "Miss Louisa Bankes on the 19th. He told me the patient "had been excited by the visit of her sister, and it had done "her a great deal of harm. On which I said, 'Perhaps she "'had better not come again.'"

The circumstances which attended the execution of the will were detailed by Mr. Senior, an attorney at Richmond. [4] His evidence was that Smethurst, who was a complete stranger, came to him on the Saturday and asked whether he would make a will for Miss Bankes on the Sunday, which Mr. Senior with some reluctance agreed to do. Smethurst said, "This is what the will would be," and produced a draft will in his own favour, saying that the draft had been prepared by a barrister in London—a statement which, if true, might easily have been proved, but which was not proved. He also gratuitously informed Mr. Senior of the state of his relations with the deceased, and endeavoured to persuade him to allow a witness to attest the execution of the document under a false impression as to its nature. It is true that the will was as much the act of the deceased as his own; but it is also true that its execution was, according to Mr. Senior's evidence, attended with falsehood on his part, and with a want of decency which showed a temper very greedy after the property to be disposed of.

[1] P. 513. [2] P. 525. [3] P. 552. [4] P. 520.

These are the suspicious parts of the prisoner's conduct towards the deceased. [1] His having written for Miss Louisa Bankes to come down on the Sunday, and his suggestion that she should take a lodging in the neighbourhood, may perhaps weigh in the other scale; [2] and it is no doubt possible to take a similar view as to his having called in Dr. Todd. The weight of each of these circumstances is, however, diminished by several considerations. When Miss Louisa Bankes came down on the Sunday to see the deceased, Smethurst appears, from the evidence, to have objected to every proposal she made to attend on her sister. [3] He told her once that she could not bear her in the room; [4] another time (on her proposing to sit up with her all night), that he would rather attend upon her himself; [5] and on the Monday he persuaded her to go up to London to have a prescription made up, which occasioned her absence from the house for two or three hours.

TRIALS.

With respect to Dr. Todd's visit, it should be borne in mind that Miss Louisa Bankes had suggested that Mr. Lane, a relation, should be consulted. Smethurst objected to this. [7] "The deceased lady," says Dr. Bird, "more than once, in "the presence of the prisoner, expressed a wish for further "medical assistance, and it was after this that Dr. Todd "was called in." It is not, therefore, true that Smethurst spontaneously called in Dr. Todd. But even if he did, the suggestion presents itself that his object was to make evidence in his own favour. This, however, appears needlessly harsh. The fair conclusion would seem to be that the reference to Dr. Todd, under the circumstances of the case, proves nothing either for or against the prisoner. When Dr. Julius and Dr. Bird were freely admitted to watch every stage of the case, the visit of an additional physician, however eminent, could hardly entail much additional risk. It was also urged that Smethurst supplied Dr. Bird with matter for the purpose of analysis. That is true: but to have refused Dr. Bird's application would have been suspicious in the extreme; and it would probably have had no other effect than that of inducing him to obtain what he required by other means. Indeed, Dr.

[1] P. 516. [2] Bird, p. 532. [3] P. 516. [4] P. 516.
[5] P. 517. [6] P. 513. [7] P. 532.

TRIALS.

Bird, [1] with an artifice which under the circumstances was natural and probably justifiable, gave a false account of the purpose for which he wanted it. This point, therefore, may be left out of the case.

No poison was traced to the prisoner's possession, and this is usually one of the facts relied on in trials for poisoning. It must, however, be remembered that, as a medical man, Smethurst could have no difficulty in getting poison; and he would appear to have been left at liberty in his lodgings for some time after his arrest. It does not, however, clearly appear from the Lord Chief Baron's notes of the evidence what opportunities he had during this interval of making away with poison unobserved. Dr. Bird said, "He was taken "into custody about five P.M., and admitted to bail on his "own recognizance. I returned to his house with McIntyre" (the superintendent of police) "and prisoner, all three to- "gether. McIntyre took possession of all" [[2] the bottles and vessels about the deceased's room.] "They were handed "out to McIntyre, who stood at the door." McIntyre says, "[3] He" (Smethurst) "was allowed to go at large on his own "recognizances. I returned with him and Bird to Alma "Villas. They handed out bottles and vials; I handed them "to Dr. Taylor. I saw the secretary." (This was a secretary belonging to the landlord of the house, which stood outside Miss Bankes's room, and of which Smethurst had been allowed to make use and to keep the keys.) "The whole "of the evening he was at liberty, and till eleven o'clock" (eleven A.M. May 3rd), "when, hearing of Miss Bankes's death, "I took him into custody." If the meaning of this is that Smethurst was alone in the house all night, and at liberty, the non-discovery of poison proves nothing. If he was watched by McIntyre, and if McIntyre's evidence means that he not only saw the secretary, but saw what was in it, the fact that no poison was found would be in his favour.[4]

[1] P. 533. [2] These words are omitted in the Judge's note.

[3] "*Examined* the secretary." *Sess. Pap.* 546.

[4] The Report in the *Sessions Paper* seems to show that the secretary was examined, but does not show whether the prisoner had the control of the lodgings at night. McIntyre found bottles on a second search which he had not seen the first time.

The fair conclusions upon the whole of this part of the evidence would seem to be that Smethurst would gain in respect of money, and might in other respects derive advantage from the death of Miss Bankes, and that his conduct towards her was suspicious in several material particulars, and that he was the only person who had the opportunity of poisoning her, if she was poisoned at all.

TRIALS.

The next division of the evidence was the medical testimony, and this again divided itself into two parts—the evidence of the medical men who actually attended the deceased, and the opinions pronounced by others as to the cause to which the symptoms reported by them were to be referred. [1] In considering this part of the case, it must be remembered that Smethurst himself acted as a medical man throughout Miss Bankes's illness. He constantly administered food and medicine to her, and repeatedly discussed with the other physicians about the course to be taken, and they appear to have relied principally on his reports as to the symptoms of the disease.

The course of the symptoms and treatment was as follows:—[2] Dr. Julius was called in on the 3rd April, and was told by Smethurst that Miss Bankes was suffering from diarrhœa and vomiting; on the 5th he said she was bilious, and that there was much bile to come away. The vomiting and purging continued, the colour of the vomit being grass-green. She began to pass blood on the 8th, and the symptoms continued to increase. She complained of heat and burning in the throat and through the bowels. [3] When Dr. Todd examined her he observed "a remarkable hardness and rigidity "of the abdomen, suggesting great irritation, and a very "peculiar expression of countenance, as if she was under "some influence or terror which did not result from any "disease." He prescribed opium and sulphate of copper. [4] Smethurst afterwards, according to Dr. Bird and Dr. Julius, stated to them that these pills produced "violent palpitations, "as if her heart were jumping out of her body, and intense "burning in the throat, constant vomiting, and fifteen bloody "motions." He said ([5] said Dr. Julius), "the burning was

[1] P. 531. [2] Pp. 522-3. [3] P. 543. [4] P. 532. [5] P. 524.

TRIALS.

"throughout the whole canal. His expression was from the "mouth to the anus," an effect which, [1]according to Dr. Julius, Dr. Bird, and Dr. Todd, could not have been so produced. [2]During the last day and a half of life she twice vomited medicine, and was purged three times before 12 on the Monday night; after that she retained both food and medicine, and died of exhaustion on the Tuesday, at 10.55 A.M.

Such was the course of the symptoms. The opinions formed on them by the medical men were as follows:—

Dr. Julius first, and Dr. Bird afterwards, came independently to the conclusion that, whatever was the complaint of Miss Bankes, the natural effect of the medicines which they administered was perverted by the administration of some irritant poison. Dr. Julius's words are, [3]"I tried a variety "of remedies; whatever was given, the result was the same. "No medicine produced any of the effects I expected in "arresting the disease. The symptoms continued the same "after every medicine. On the 18th" (of April), "I had "formed an opinion as to the reason of the sufferings. I "thought there was something being administered which had "a tendency to keep up the irritation in the stomach and "bowels, and now I am unable to account in any other way "for the continued irritation. In consequence of this opinion, "I requested my partner, Mr. Bird, to see her, and I left him "to form an unbiased opinion." Mr. Bird said, [4]"I formed an "opinion that some irritant was being administered that coun-"teracted the effect of the medicines we were giving. I had "a conversation with Dr. Julius about it three days after I "began to attend, about 21st of April. He asked me my "opinion of the case before he told me his own." Dr. Todd said, [5]"I inquired of Dr. Julius the symptoms of the treat-"ment," and after describing the peculiar expression of countenance already referred to, he added, "I was very strongly "impressed with the opinion that she was suffering from some "irritant poison. It was by my desire that part of a motion" (which was afterwards analysed by Dr. Taylor) "was obtained. "I suggested sulphate of copper and opium." Thus, the

[1] Pp. 524, 532, 543. [2] Pp. 533, 519. [3] P. 523.
[4] P. 532. [5] P. 543.

medical evidence begins with this fact, that three medical men who saw the deceased whilst living came independently to the conclusion that she was then being poisoned. [1] So strongly were the two Richmond doctors impressed with this, that they thought it their duty to go before a magistrate, whilst Dr. Todd suggested the chemical examination of the evacuation.

TRIALS.

After the death of Miss Bankes, her body was examined by Mr. Barwell, who found a large black patch of blood near the cardiac, or upper end of the stomach, redness in the small intestines in several places; and in the cæcum, or first division of the large intestines, appearances indicating serious disease, namely, inflammation, sloughing, ulceration, suppuration. In the rectum there were three ulcerations. Of these, and some other post-mortem appearances, and of the symptoms presented during life, [2] Mr. Barwell said, "They are not "reconcilable with any natural disease with which I am "acquainted;" and he added, "The conclusion that I drew "is that the symptoms have resulted from the administration "of some irritant poison frequently during life." [3] Dr. Wilkes said, "I should ascribe her death to an irritant. I am not "familiar with any form of disease which would account for "the symptoms and appearances." [4] Dr. Babington, [5] Dr. Bowerbank, [6] Dr. Taylor, and [7] Dr. Copland, all expressed the same opinion.

In opposition to this evidence, it was contended on the part of the prisoner that the symptoms were not those of slow poisoning; and the evidence in support of this opinion consisted, first, of proof of inconsistencies between the symptoms observed and those of slow poisoning by arsenic or antimony; and, secondly, of explanations of the symptoms on the theory that they were due to some other disease. The evidence to show that the symptoms were inconsistent with arsenical poisoning was that several symptoms were absent which might have been expected on that hypothesis.

The most important of these, according to Dr. Richardson, were nervous symptoms, especially convulsions and tremor of

[1] P. 525. [2] Pp. 539-540. [3] P. 542. [4] P. 549.
[5] P. 550. [6] P. 556. [7] P. 551.

TRIALS.

the whole of the limbs; also inflammation of the membrane of the eye, soreness of the nostrils and other mucous orifices, and an eruption on the skin peculiar to arsenical poisoning. It appeared, however, that none of the witnesses, either for the crown or for the prisoner, had ever seen a case of slow poisoning by arsenic. [1] Their opinions were formed partly from experiments on animals, and it also seemed clear that the symptoms of arsenical poisoning varied considerably in different cases. [2] Dr. Taylor said, "We never find two cases "alike in all particulars;" and [3] Dr. Richardson said that he should not expect to find all the symptoms to which he referred in any one case, though he did not think it possible they should all be absent.

The evidence that antimonial poisoning was not the cause of death was fainter than the evidence against arsenical poisoning. [4] Dr. Richardson, one of the prisoner's witnesses, said that he should have expected to find congestion of the lungs and a cold sweat, if death had been caused by antimonial poisoning. Mr. Rogers (who, however, said that he knew little of pathology, having attended principally to chemistry) added, he should have expected in addition softening of the liver, and Dr. Thudichum agreed with them. Dr. Richardson, however, admitted that he knew very little about antimonial poisoning, and his evidence upon the subject was cautious and qualified. [5] He said, "The symptoms "in Miss Bankes's case are not altogether reconcilable with "slow poisoning by antimony. With respect to the effect of "antimony on the human liver, there are no data. The "evidence is very scanty."

This is the principal part of the evidence as to whether or no the symptoms were those of slow poisoning. It is obvious that the evidence for the prisoner did not exactly meet the evidence for the crown. The witnesses for the crown all spoke indefinitely of "some irritant." The medical witnesses for the prisoner did not negative the general resemblance between the symptoms and those of poisoning by an irritant poison, but testified to the absence of some of the symptoms which might be expected to arise from two specific poisons,

[1] P. 563. [2] P. 560. [3] P. 563. [4] P. 566. [5] P. 566.

namely, arsenic and antimony. That there was a general resemblance between the symptoms and those of some irritant seems to have been proved beyond all reasonable doubt, not only by the fact that the three doctors who saw the deceased during her life formed that opinion independently of each other, but by the evidence of the seven other medical witnesses for the prosecution, and by a statement made by Dr. Tyler Smith, who was called for the prisoner. [1] He said that if a pregnant woman were affected with diarrhœa it might degenerate into dysentery, and that he had known a case of the kind which was supposed to be a case of poisoning. The medical witnesses for the prisoner attributed Miss Bankes's death to dysentery, aggravated by pregnancy; and it thus appears, from Dr. Tyler Smith's evidence, that they attributed it to a disease which may closely resemble the symptoms produced by the administration of irritant poisons. TRIALS.

The prisoner opposed the theory of the prosecution, not only by denying that the symptoms were those of slow poisoning, but by asserting that they were those of dysentery. [2] All the medical witnesses whom he called swore to their belief that all the symptoms were consistent with this theory. On the other hand ([3] with one exception), they all agreed with the witnesses for the prosecution that dysentery was a very rare disease in this country, and their experience of it was in no case great. Dr. Richardson said, [4] "The word is used very "loosely;" and he added, "I have seen a few cases of dysen-"tery—two or three in this country; I have suffered from it "myself." [5] Dr. Thudichum had seen two cases in London of what he called diphthæritic dysentery, to which he attributed the death of the deceased. [6] Dr. Girdwood said, "Dysentery "is not very common;" and he added, "The dysentery I allude "to is one which I know to exist in this country." [7] Dr. Webbe. on the contrary, said, "Dysentery is a very common disease "in this country." Both he and Dr. Girdwood appear, however,

[1] P. 586.
[2] Richardson, 565–571. Thudichum, 574. Webbe, 578. Girdwood, 582. Edmunds, 583. Tyler Smith, 585-6. Mr. Rogers was a chemist and not a practising physician.
[3] Richardson, 567. [4] P. 567. [5] P. 575.
[6] P. 583. [7] P. 578.

TRIALS. to have been speaking of a form of the disease differing in various particulars from that which in hot countries is described as dysentery.

The experience of some of the witnesses for the prosecution as to dysentery proper was much more extensive. [1] Dr. Bird had seen many cases of it in the Crimea. [2] Dr. Bowerbank was twenty-three years in practice in Jamaica, where acute dysentery is a common disease. He said, "The symptoms, "mode of treatment, and appearances post-mortem, are not "reconcilable with any form of dysentery." [3] Dr. Copland saw many cases in 1815 and 1816, and in Africa in 1817. He said, "Her death is not referable to acute dysentery." [4] Dr. Babington saw six or eight epidemic cases in Chelsea, and two more in Hammersmith. He said, "I have heard "the symptoms and remedies, and also the post-mortem ex-"amination; taking all those circumstances, I do not think "she died of acute dysentery."

[5] On the other hand, Dr. Todd, after giving his opinion that slow poisoning was the cause of death, said, "Acute dysentery "alone would account for the worst symptoms." It appeared, however, that he had never seen a case of that disease. Two of the prisoner's witnesses, whose evidence in the event was very important, described cases similar in many particulars to Miss Bankes's, in which women had died of dysentery combined with pregnancy. [6] Mr. Edmunds had a patient who miscarried at the seventh month of her pregnancy, and ultimately died of dysentery; and [7] Dr. Tyler Smith said he had known cases in which the sickness often incidental to pregnancy, especially during its early stages, had caused death; and he added that this sickness "might be accompanied by "diarrhœa, and that might degenerate into dysentery." [8] It appeared that two years before Miss Bankes had had a complaint of the womb, which, in Dr. Tyler Smith's opinion, would

[1] P. 534. [2] P. 550. [3] P. 551. [4] P. 549.

[5] The emphasis lies on *acute* and *alone*. In the *Sessions Paper* the answer is, "The only form of dysentery that would account for any portion of these "grave symptoms would be what is called acute dysentery."—P. 545.

[6] P. 584.

[7] P. 586. He referred in particular to the case of Mrs. Nicholls, the authoress of *Jane Eyre*, &c. [8] Pp. 517-8.

aggravate the sickness consequent on pregnancy. There was also some evidence that she was bilious, which would have a similar effect. TRIALS.

Dr. Tyler Smith and Mr. Edmunds were called after the rest of the prisoner's witnesses, and till they were called the question as to the effect of pregnancy was passed over somewhat lightly on both sides. Most of the witnesses deposed to the well-known fact that sickness is very common in the early stages of pregnancy, and some of them added that they had known the sickness to be attended with diarrhœa, though they all spoke of that as an uncommon circumstance. Of the witnesses for the prosecution, [1] Dr. Julius and [2] Dr. Bird said that the opinion which they had formed of the case was not altered by the fact of pregnancy. [3] Dr. Todd thought that pregnancy would not account for the extensive ulceration of the bowels: and [4] Dr. Babington, whose experience in midwifery was large, said, "I do not consider her death in any "way to have been occasioned by insipient pregnancy. I do "not remember any case in the early stage (of pregnancy) "where the life of the mother has been saved by abortion." The case of abortion referred to by Mr. Edmunds was in the seventh month.

The general result of the medical evidence appears to be—

First.—As to the connection of the symptoms of Miss Bankes's illness with poisoning—

That the symptoms which preceded Miss Bankes's death so much resembled those of slow poisoning by some irritant, that the three doctors who saw her during her life independently arrived at the conclusion that they must be attributed to that cause; that two of them acted upon this impression by going before a magistrate; and that eight other doctors, who judged from the accounts which they heard of the symptoms, treatment, and post-mortem appearances, came to the same conclusion. On the other hand, some of the symptoms which might have been expected in slow poisoning by arsenic or antimony were wanting, but there was evidence that these symptoms are not invariable.

[1] P. 528. [2] P. 534. [3] P. 543. [4] P. 549.

TRIALS.

Secondly.—As to the connection of the symptoms with dysentery—

That there is much general resemblance between the symptoms of dysentery and those of poisoning; that dysentery proper is an extremely rare disease in this country; that there was a difference of opinion between the witnesses for the crown and those for the prisoner on the question whether dysentery alone would produce the symptoms observed, but that the witnesses for the crown had had much greater experience of the disease.

Thirdly.—As to the pregnancy of the deceased—

That there was some evidence that it was possible that the symptoms which occurred in Miss Bankes's case might be produced by a complication of pregnancy and dysentery.

Taking all these three conclusions together, the medical evidence seems to establish that Miss Bankes's symptoms were not only consistent with slow poisoning by some irritant, but that they actually convinced the doctors who attended her that they were caused by that means.

This is the proper place to notice a circumstance respecting the pregnancy of Miss Bankes, which assumed more importance after the prisoner's conviction than it had at the trial, though it was even then important. [1] Dr. Julius said, "Early "in the visits I inquired about her being in the family way. "Dr. Smethurst said she was unwell ([2] usual period on her). "It was within five or six days of my first attendance"—*i.e.* about the 10th April. As she was in the fifth or seventh week of her pregnancy at the time of her death (May 3rd), it was highly improbable that this should have been the case. [3] Dr. Tyler Smith said, "In some cases, the periods occur after "pregnancy, once in a hundred times—certainly as often as "that." A medical man would hardly have made the assertion which Dr. Julius swore that Smethurst made without knowledge as to its truth; and Dr. Tyler Smith's evidence shows that, apart from the value of his assertion, there was (at the time of the trial) a chance—perhaps not less than a hundred to one—that it was untrue. Therefore (at the trial) the evidence, if believed, showed that Smethurst had made

[1] P. 523. [2] *Sic* in Judge's notes. [3] P. 585.

a statement which, if false, was probably false to his knowledge, and the chance of the falsehood of which (apart from the value of his assertion) was as a hundred to one.

The third and last division of the evidence is the chemical evidence. [1] Dr. Taylor deposed that he had discovered arsenic in an evacuation procured for the purpose by Dr. Bird on the 1st May, three days before the death of Miss Bankes; and antimony in two places in the small intestine, in the cæcum or upper division of the large intestine, in one of the kidneys, in the blood from the heart, and in the liquor which had drained from part of the viscera into the jar which contained them. He calculated that four ounces of the evacuation contained less than one-fourth of a grain of arsenic. As to the antimony, Dr. Taylor was corroborated by [2] Dr. Odling, who assisted in the examination of those parts of the body in which it was alleged to be found.

This evidence was opposed, first, by an attack on Dr. Taylor's credit. The first objection made to his evidence related to the arsenic. [3] It appeared that amongst other things he examined for arsenic a bottle containing chlorate of potass, a mixture which the prisoner had been recommended by Mr. Pedley, a dentist, to use for foulness of breath. In testing it, Dr. Taylor used copper gauze, which was dissolved by the chlorate of potass, and on the dissolution of which a certain quantity of arsenic which it contained was set free. After exhausting the chlorate of potass by dissolving the copper gauze, he introduced other copper, and upon this crystals of arsenic were deposited. He thus extracted from the liquid arsenic which he had himself introduced into it. The inference drawn from this was that Dr. Taylor's evidence generally, and especially as to the arsenic in the evacuation, could not be relied on.

As to its bearing on the general value of his evidence, Mr. Brande, a very eminent chemist, said that he should have fallen into the same error :—[4] "The fact," he said, "is new "to the chemical world." As to the bearing of the mistake

[1] Pp. 553-4. [2] P. 561. [3] P. 587.

[4] Somewhat less strongly in the *Sessions Paper* : "The matter that has "appeared since is to a certain extent new to the chemical world."—P. 562.

TRIALS. upon the discovery of arsenic specially, two observations occur. In the examination both of the draught and of the evacuation, Reinsch's test was employed, and it was also employed in more than seventy other experiments, and is a well-known and established process for separating arsenic and some other minerals from matter in which they are contained. Copper gauze is introduced into the liquid to be tested, and by chemical means the metal is deposited on it in a crystalline form. In the case of the draught, the arsenic deposited on the gauze may, no doubt, have been that which was contained in the other gauze which had been previously dissolved. [1] Altogether there were seventy-seven experiments conducted by the same process. In one, copper was dissolved and arsenic found. In seventy-four, no copper was dissolved, and no arsenic was found; in two (on the evacuation) no copper was dissolved, and arsenic was found. The first experiment confirms the general doctrine that the test will detect arsenic, as it extracted arsenic from a liquid into which arsenic had been introduced. The seventy-four cases in which arsenic was not found showed that the process was not so conducted as of itself to produce arsenic; and both the first experiment and the other seventy-four taken together confirm the impression that the two remaining experiments proved both that there was arsenic in the evacuation, and that it was not put there by Dr. Taylor.

The second argument against Dr. Taylor's evidence as to arsenic was brought forward by the three chemical witnesses for the prisoner—Dr. Richardson, Mr. Rogers, and Dr. Thudichum. Dr. Richardson said, "It is quite impossible "that a person should die of arsenical poisoning without "some being found in the tissues. It makes no difference in "[2] whatever way or under whatever combination the arsenic "was introduced." He also referred to the case of three dogs which he had poisoned by repeated small doses of arsenic and antimony. To one of them he administered eighteen grains in sixteen days, and killed him twelve hours after the

[1] P. 557. It is not quite clear whether there were seventy-seven or seventy-eight, nor is it material.

[2] *I.e.* By the mouth or by injection.—P. 564.

last meal. He found some arsenic in his liver, lungs, and heart, and a trace in the spleen and kidneys,—the greater part by far in the liver. He said, "I cannot now say how "much arsenic I found altogether. I will not venture to "say I found half a grain or a grain. [1] I think," he afterwards added, "I could venture to say I found a quarter of "a grain."

This evidence was hardly opposed to the theory of the prosecution. The account of the matter appears to be this: Arsenic on administration passes into the stomach; it is there taken up into the circulation; thence it passes with the blood through the organs which separate the various fluids secreted from the blood—in the same manner it passes into the flesh—and it finally leaves the body by the skin, or by the ordinary channels. When the patient dies, all vital functions being arrested, the poison will be found at that point of the process which it happened to have reached at the moment of death. The poison, however, is continually passing through the body, and this goes on to such an extent that Dr. Richardson could not venture to say he found more than a quarter of a grain of arsenic in the dog to which he had administered eighteen grains; but as, in order to try the effects of chlorate of potass in eliminating the arsenic, a large quantity of that substance was administered, this was a peculiar case. If the dog had been left to die from the effects of the poison, it is not improbable that a smaller quantity, or even none at all, might have been discovered. The evidence of Dr. Richardson seems to prove that, upon the supposition of poisoning by arsenic, arsenic must have been present in various parts of Miss Bankes's body at the time when the arsenic discovered by Dr. Taylor passed from her, rather than that it must have been present after her death. It might have passed away in the interval; and thus the absence of arsenic in the tissues after death would go to prove, not that no arsenic had been administered during life, but that none had been administered during the last two or three days of life.

[1] P. 565. A word or two have dropped out of the Judge's note in the answer quoted.

TRIALS.

Indeed, Dr. Richardson's experiments do not support the strong opinion he gave as to the impossibility of death by arsenic without arsenic being found in the tissues, unless it be restricted to the direct as distinguished from the secondary effects of arsenic. It was agreed on all hands that the proximate cause of Miss Bankes's death was exhaustion.

With regard to the antimony, the only evidence offered in opposition to Dr. Taylor was that of Dr. Richardson and Mr. Rogers. [1] Dr. Richardson said he should have expected to find antimony in the liver, but he spoke with hesitation upon the subject. Mr. Rogers's evidence was to the same effect, but he said, [2] "My speciality is chemistry and not pathology." Upon this evidence, it must be observed that there is the direct assertion of a fact on the one side, against an expression of opinion on the other. Dr. Taylor said, "I found "antimony in the intestines." Dr. Richardson and Mr. Rogers replied, "It should have been in the liver." Dr. Taylor was not cross-examined, nor was any substantive evidence offered to show that there was any fallacy in the tests by which he alleged that he had discovered antimony in Miss Bankes's intestines.

With respect to the antimony, it should be mentioned that, after Smethurst had been committed, it appears from the evidence that he wrote three letters to Dr. Julius, asking him for copies of the prescriptions dispensed by him for Miss Bankes. The first letter, dated May 5th, was as follows: "Dr. Smethurst will feel much obliged by forward- "ing as above, by return of post, prescriptions of the following "medicines, prescribed and dispensed by the firm of Dr. "Julius and Mr. Bird, required for defence—the sulphate of "copper and opium pills (Dr. Todd); 2nd, the nitrate of "silver pills; 3rd, the bismuth mixture." On the 6th he wrote to the same effect, stating the medicine as follows: "Acetate of lead and opium, the nitrate of silver pills, the "bismuth mixture, the pills with sulphate of copper." On the 9th he wrote a third time, heading his letter "Second "application," in these words, [3] "Sir, I made application for "the acetate of lead prescription, prescribed by you or Mr.

[1] Pp. 525-6. [2] P. 554. [3] P. 506.

"Bird, with date; also the dates of prescriptions sent, which "were wanting—*namely*, 1*st*, *antimony;* 2nd, sulphate of "copper; 3rd, nitrate of silver." Antimony was never prescribed nor mentioned till this third letter.[1] It does not appear, from Dr. Taylor's evidence, that at that time he had found any antimony.

TRIALS.

An attempt was made to account for the presence of the antimony and arsenic alleged to be discovered by Dr. Taylor by the suggestion that it might have been contained in the medicines administered to Miss Bankes during her life. Arsenic is generally found in bismuth, and [2] for three or four days doses of bismuth, containing five or six grains, were administered to Miss Bankes. [3] Dr. Richardson put the proportion of arsenic in bismuth at half a grain in an ounce, and, as an ounce contains 480 grains, each dose would have contained about $\frac{1}{140}$ of a grain of arsenic. If, therefore, Miss Bankes took twelve doses of bismuth, she would have taken between one-eleventh and one-twelfth of a grain of arsenic in four days. This seems (for it is not perfectly clear), from Dr. Bird's evidence, to have been more than a week before the day on which he obtained the evacuation analysed by Dr. Taylor, and in four ounces of which he said he found nearly one-fourth of a grain.

[4] Upon the question of the credit due to the chemical witnesses for the defence, it was brought out on cross-examination that all of them, as well as Dr. Webbe, were connected with the Grosvenor School of Medicine; and that two, Dr. Richardson and Mr. Rogers, had given evidence for the prisoner in Palmer's trial,—the object of Dr. Richardson's evidence being to show that Cook's symptoms were those of angina pectoris, and the object of Mr. Rogers's being to show that, if he died of strychnine, it ought to have been found in his body.

The result of the chemical evidence seems to be that there was evidence to go to the jury, both that arsenic passed from

[1] P. 572. [2] P. 535.

[3] P. 567. "The quantity varies very materially. The largest quantity "that I am acquainted with is very nearly half a grain in one ounce."

[4] Dr. Richardson, 568; Mr. Rogers, 574. His connection with the school had ceased at the time of the trial. Dr. Thudichum, 575.

TRIALS.

Miss Bankes, and that antimony was found in her body after death; the evidence as to the antimony being the stronger of the two. There was also evidence for their consideration affecting the credit of Dr. Taylor as an analyst, and suggesting the presence of a professional *esprit de corps* amongst the witnesses for the prisoner, which, if it existed, might affect their impartiality.

Combining the inferences deducible from each separate division of the evidence, which, of course, strengthen each other, there can be little doubt that, if the jury believed that poison was found in Miss Bankes's body, they were bound to convict the prisoner. Even if the whole of the chemical evidence on both sides were struck out, there was evidence on which, if it satisfied them of his guilt, they might have convicted him, though such a conviction would have proceeded on weaker grounds than juries of the present day usually require in cases which attract great public attention and involve capital punishment. As it was they convicted him, and he received sentence of death.

The trial at any time would have excited great public attention; and, as it took place in the latter part of August, after parliament had risen, it excited a degree of attention almost unexampled. The newspapers were filled with letters upon the subject, and one or two papers constituted themselves amateur champions of the convict, claiming openly the right of what they called popular instinct to overrule the verdict of the jury. Petitions were presented on the subject, and communications of all kinds relating to it were addressed to Sir George Lewis, Secretary of State for the Home Department. All these were forwarded to the Lord Chief Baron for his opinion, and were considered by him in an elaborate report to the Home Secretary. Some of the letters were of great importance; but the majority were nothing more than clamorous expressions of opinion, founded upon no real study of the case: for which, indeed, those who took their notions of it exclusively from newspaper reports had not sufficient materials. A considerable number of the communications were simply imbecile. One man, for example, wrote in pencil, from the Post Office, Putney, in favour of the

execution of the sentence; another, "a lover of justice," thought that, if the voice of the nation was not attended to, by respiting the convict, we had better be under the sway of a despot. Many other letters, equally childish and absurd, were received, and all appear to have been considered. I refer to them merely as illustrations of the ignorance, folly, and presumption, with which people often interfere with the administration of public affairs.

Upon a full examination of the various points submitted to him, including in particular a notice of an important, though somewhat hastily prepared, communication from Dr. Baly and Dr. Jenner, and after commenting on the medical evidence given at the trial, the Lord Chief Baron said:—"The medical "communications which have since reached you put the "matter in a very different light, and tend very strongly to "show that the medical part of the inquiry did not go to the "jury in so favourable a way as it might, and indeed ought "to have done, and in two respects—

"1. That more weight was due to the pregnant condition "of Miss Bankes (a fact admitting, after the post-mortem, of "no doubt) than was ascribed to it by the medical witnesses "for the prosecution.

"2. That, in the opinion of a considerable number of "medical men of eminence and experience, the symptoms of "the post-mortem appearances were ambiguous, and might "be referred either to natural causes or to poison. Many also "have gone so far as to say that the symptoms and appear-"ances were inconsistent and incompatible with poison."

On the other hand, the Lord Chief Baron referred to "disclosures made since the trial," which, in his opinion, "confirmed the prisoner's guilt." These were, first, a statement in a memorial from Smethurst to the Prince Consort, stating that "a lady friend of deceased was a witness," to her knowledge of the fact that he was married already, and that she (Miss Bankes) wished the ceremony to be gone through. This lady "was to have been called, but Mr. Parry deemed it "unnecessary." Upon this the Chief Baron observes: "I do "not believe Mr. Serjeant Parry gave any such advice; but, "if it be true that any such evidence was ready, why is not

TRIALS.

"the lady friend named, and why is not her statement or "declaration now offered and laid before you? Such evidence "would, in my opinion, much alter the complexion of the "case."

[1] Secondly, the report refers to certain entries in a diary said to be the prisoner's, of which no notice was taken at the trial. These entries appeared to the Lord Chief Baron to show that one of Smethurst's statements as to Miss Bankes's symptoms was wilfully false. This would, of course, be a most important fact; but the report does not show how Smethurst was connected with the diary, when it was discovered, or why it was not given in evidence at the trial.

The report concluded in the following words:—"I think "there is no communication before you in all or any of the "papers I have seen upon which you can rely and act. That "from Dr. Baly and Dr. Jenner seemed to me to be the most "trustworthy and respectable; but there is an unaccountable "but undoubted mistake in it which must be rectified before "it can be taken as the basis of any decision. If you have "been favourably impressed by any of the documents, so as "to entertain the proposition of granting a pardon, or of "commuting the sentence to a short period of penal servi- "tude, I think it ought to be founded upon the judgment "of medical and scientific persons selected by yourself for "the purpose of considering the effect of the symptoms and "appearances, and the result of the analysis, and I think, "for the prisoner's sake, you ought to have the points "arising out of Herapath's letter further inquired into and "considered. I forbear to speculate upon facts not ascer- "tained; but, if Dr. Taylor had been cross-examined to this, "and had given no satisfactory explanation, the result of the "trial might have been quite different."

[1] After Dr. Smethurst's pardon, he was convicted for bigamy, and sentenced to a year's imprisonment. On the expiration of his imprisonment, he commenced proceedings in the Court of Probate to have the will executed by Miss Bankes established. It was contested by her family; and one of the points raised was, that it was obtained by fraud, as she was under a mistake as to her true position, and supposed herself to be Smethurst's true wife at the time of the execution of the will. The question whether this was so was specifically left to the jury, and found by them in Smethurst's favour. This would, of course, strengthen the conclusion that further inquiry was necessary, and weaken the case against Smethurst.

The meaning of the allusion to a mistake in the communication of Dr. Baly and Dr. Jenner is that their letter contained this passage: "We would further remark, with regard to the "symptoms present, that Dr. Julius appeared to have been in "attendance on Isabella Bankes five days before he heard of "vomiting as a symptom; this absence of vomiting at the "commencement is quite inconsistent with the belief that an "irritant poison was the original cause of the illness." This was completely opposed to Dr. Julius's evidence, who spoke of "diarrhœa *and vomiting*" as present from his very first visit throughout the whole course of the illness.

The "points arising out of Herapath's letter" were these:—Mr. Herapath addressed a letter to the *Times*, in which he asserted that Dr. Taylor had extracted from the draught containing chlorate of potass a larger quantity of arsenic than could have been set free by the copper gauze which he dissolved in it. If this had been substantiated, it would have no doubt diminished the weight of Dr. Taylor's evidence; but, on the other hand, it would have led to the conclusion that the draught contained arsenic which Dr. Taylor had not put there—an inference which, if true, would have been fatal to the prisoner.

Upon receiving this report, Sir George Lewis took steps which he described in a letter to the Lord Chief Baron, a copy of which was communicated to the *Times*, and published on the 17th November, 1859. After referring to the Lord Chief Baron's recommendation, Sir George Lewis says: "I have sent the evidence, your Lordship's report, and all "the papers bearing upon the medical points of the case, to "Sir Benjamin Brodie, from whom I have received a letter, "of which I inclose a copy, and who is of opinion that, "although the facts are full of suspicion against Smethurst, "there is not absolute and complete evidence of his guilt.

"After a very careful and anxious consideration of all the "facts of this very peculiar case, I have come to the con"clusion that there is sufficient doubt of the prisoner's guilt "to render it my duty to advise the grant to him of a free "pardon . . . . The necessity which I have felt for advising "her Majesty to grant a free pardon in this case has not, as

Trials.

"it appears to me, risen from any defect in the constitution or "proceedings of our criminal tribunals; it has risen from the "imperfection of medical science, and from fallibility of judg- "ment in an obscure malady, even of skilful and experienced "practitioners."

Sir Benjamin Brodie's letter, founded on a consideration of the whole of the materials submitted to him, consists of six reasons for believing that Smethurst was guilty, and eight reasons for doubting his guilt; and it concludes in these words: "Taking into consideration all that I have now "stated, I own that the impression on my mind is that there "is not absolute and complete evidence of Smethurst's guilt." The reasons given are by no means confined to the medical points of the case, but range over every part of it, including inferences from the behaviour and moral character of the prisoner; and, indeed, of the six reasons against the prisoner, two only, and of the eight reasons in his favour, four only, proceed upon medical or chemical points. These opinions are expressed with a cautious moderation which, however creditable to the understanding and candour of the writer, excite regret at the absence of that opportunity which cross-examination would have afforded of testing his opinions fully, and of ascertaining the extent of his special acquaintance with the subjects on which his opinion was requested.

The great interest of this trial lies in its bearing on the question of new trials in criminal cases. The jury convicted Smethurst on the evidence as it stood, and if it had remained unaltered their verdict would undoubtedly have been justified. After the trial it appeared that on the points mentioned by the Lord Chief Baron, further information appeared to be requisite. The Secretary of State thereupon asks a very eminent surgeon what he thinks of the whole case, and receives from him an opinion that "though the facts are full "of suspicion against Smethurst, there is not absolute and "complete evidence of his guilt." Sharing this view, the Secretary of State advises the grant of a free pardon. It is difficult to imagine anything less satisfactory than this course of procedure. It put all the parties concerned—the Secretary of State, Sir Benjamin Brodie, and the Lord Chief Baron—in

a false position. Virtually they had to re-try the man without any of the proper facilities for that purpose,—without counsel, or witnesses, or an open court. The result was substantially that Smethurst, after being convicted of a most cruel and treacherous murder by the verdict of a jury after an elaborate trial, was pardoned, because Sir Benjamin Brodie had some doubts as to his guilt after reading the evidence and other papers, one of which was a report from the judge expressing his opinion that, owing to circumstances, the evidence had not been left to the jury as favourably for the prisoner as it ought to have been. The responsibility of the decision was thus shifted from those on whom it properly rested on to a man who, however skilful and learned as a surgeon, was neither a juryman nor a judge. It is difficult to say how, under the circumstances, Sir George Lewis ought to have acted, but it is easy to point out the course which would have been proper had it been lawful. There should have been a new trial, and no doubt there would have been one had ss. 544 and 545 of the Draft Criminal Code been in force. TRIALS.

[1]THE CASE OF THE MONK LÉOTADE.

TRIALS

LOUIS BONAFOUS, known in his convent as Brother Léotade, was tried at Toulouse in 1848, for rape and murder committed on the 15th April, 1847, on a girl of fourteen, named Cecile Combettes. The trial lasted from the 7th till the 26th February, 1848, when it was adjourned in consequence of the revolution. It was resumed on the 16th March, before a different jury, and ended on the 4th April. The case was as follows:—

Cecile Combettes, a girl in her fifteenth year, was apprenticed to a bookbinder named Conte, who was much employed by the monks known as the *Frères de la Doctrine Chrétienne* at Toulouse. On the 15th April, at about nine, Conte set out to carry to the monastery some books which the monks wanted to have bound. He put them in two baskets, of which the apprentice carried the smaller, and he and a woman called Marion, the larger. When he was let into the convent he saw, as he declared, two monks in the passage. One, Jubrien, wore a hat, the other, Léotade, who faced him, wore a hood. Conte wished Jubrien good day, left his umbrella by the porter's lodge, laid down the baskets, and sent home the servant Marion with the sheepskins in which they had been covered. He went up stairs to take the books to the director, and the porter went with him. He left Cecile to take care of his umbrella and to help to bring back the baskets. He stayed for three-quarters of an hour with the director

[1] The authority referred to in this case is entitled, *Procès du Frère Léotade accusé du double crime de viol et d'assassinat sur la personne de Cecile Combettes. Leipzig*, 1851. The report of the first trial is full, though not so full as English reports usually are. The report of the second trial is a mere outline, but the two appear to have been substantially the same. The same witnesses were called, and the same evidence given.

and then returned. Cecile was gone, but the umbrella was standing against the wall. Conte asked the porter for Cecile. He said he did not know where she was; she might be gone, or might be at the *pensionnat.* The establishment consisted of two buildings, the *pensionnat* and the *noviciat.* They stood on different sides of a street, and communicated by a tunnel which passed under it. Behind the *noviciat* was a large garden. Trials.

Not finding Cecile, Conte went to see his uncle. [1] He afterwards bargained for a pair of wheels, went to a place called Auch, where he slept, and returned next day to Toulouse. As Cecile was not heard of in the course of the day, various inquiries were made for her. [2] Her aunt, Mme. Baylac, inquired for her at the convent, but in vain. Her parents applied to the police, and they searched for her unsuccessfully. She was never seen alive again.

Early on the following morning a grave-digger, named Raspaud, had occasion to go to a cemetery bounded on two sides by the wall of the garden of the monastery, and on a third (its figure was irregular) by a wall of its own, which divided it from a street called the Rue Riquet. The two walls met at right angles. On the ground in the corner formed by their meeting, Raspaud found the body of the girl. It was lying on the knees and the extremity of the feet. Its feet were directed towards the garden of the monks, its head in the opposite direction. [3] Over the place where the body lay and on the wall of the Rue Riquet, was a handkerchief suspended on a peg. When the commissary of police (M. Lamarle) arrived, several persons, attracted by curiosity, had come up and were standing round the body, and they were in the act of getting over the wall by a breach at the corner. They had made footmarks all about, so that it was impossible to say whether or not there were other footmarks before they came. The commissary sent for the soldiers and had the public turned out, after which he walked round the cemetery inside. [4] There were no marks of scaling the walls or of footsteps. At eight the judge of instruction arrived. [5] He was called as a witness at the trial, but on his appearance the president said, "It is well understood, sir, that you have

[1] Pp. 171-174. [2] P. 183. [3] Pp. 105, 106. [4] P. 107. [5] P. 263.

Trials.

"obeyed the citation served on you only because you thought "proper," and he replied, "To begin with, and as a general "principle, I refer to my *procès verbaux,* and to all that I have "registered in the procedure."

[1] The *procès verbaux* are not printed in the trial, but the *acte d'accusation* professes to state their purport. According to this document, the judge of instruction found on the side of the monastery wall next to the cemetery a place from which a sort of damp mossy crust had lately been knocked off. This might, from its position, have been done by the rubbing of the branches of certain cypresses which overhung the wall of the Rue Riquet and touched the wall of the monastery garden. In the hair of the dead body were particles of earth of the same kind. On the top of the monastery wall were some plants of groundsel a little faded, also a wild geranium, one of the flowers of which had lost all its petals. In the hair of the dead body was one petal which the experts declared was a petal of the same kind. There was also a thread of tow which might have come from a cord, and there was a similar thread on the cypress branches. There were no marks on the wall of the Rue Riquet except that near the junction of the two walls, and about one foot eight inches (fifty *centimètres*) from the top, there was a tuft of groundsel which looked as if it had been pulled by a hand. Near the junction of the two walls was a small plant nearly rooted up, and on the point of the junction at the top was a small branch of cypress lately broken off. The wall between the Rue Riquet itself and the monastery garden was undisturbed, though there were plants upon it, and especially a peg of fir loosely inserted which would probably have been disturbed if a body had been passed along it. The left cheek of the body and the left side of its dress were covered with dirt. As the head was away from the monastery wall, and the wall of the Rue Riquet was on the left hand of the body as it lay, the dirt would have been on the right if the body had fallen over the wall of the Rue Riquet.

From these circumstances, the *acte d'accusation* infers that the body could not have come into the cemetery over the wall

[1] P. 268.

of the Rue Riquet, and that it did come over the wall of the monastery garden. [1] To clench this argument the *acte* adds: "Lastly, the impossibilities which we have pointed out are "increased" (the energy of this phrase as against the accused is highly characteristic) "by the existence of a lamp on the "wall of the orangery of the monks which throws its light "against the surface of the wall of the Rue Riquet, precisely "at the place where the murderer would have had to place "himself to throw the body of Cecile into the cemetery. Let "us add, that at a short distance from this lamp are the "Lignières barracks, and in front of them a sentinel." It adds that these circumstances made it very unlikely that the body should have been thrown over at this point. [2] It does not add, though it appeared in the evidence of Lamarle, the commissary of police, that it was very rainy during the night before, and that the judge of instruction himself remarked, or at least that the remark was made in his presence (*il fut dit,* it does not appear by whom) that if the corpse had been thrown over from the Rue Riquet the sentinel would not have seen it, because he must have been in his box owing to the rain. The *acte* also contradicts the evidence in another particular to the disadvantage of the prisoner. [3] It says of the breach in the corner of the wall, "the breach, already" (*i.e.* when the judge of instruction arrived) "enlarged by the inquisitive "persons who got over, or leant on it, cannot favour the notion "that the body of Cecile may have traversed it to be trans-"ported to the place where it was found. The ground at the "foot of the wall, covered with damp herbs, is free from the "footmarks which must have been remarked if the murderer "had passed over and trodden on this part of the ground." [4] M. Lamarle said that when he fetched the troops the crowd had got over the breach, come within two or three feet of the body, and made footmarks.

TRIALS.

These inconsistencies give good grounds for suspicion that if the commissary and the judge of instruction had been properly cross-examined by the prisoner's counsel, the effect of much of this evidence might have been entirely removed. As it stands, it is anything but conclusive proof that the body

[1] P. 30. [2] P. 103. [3] P. 25. [4] P. 108.

TRIALS. came over the monastery wall. The earth might have been knocked off by the scraping of the boughs against the wall as the wind shook them, or it might have fallen off of itself, as such a crust naturally would when it became damp beyond a certain degree. That a geranium should lose its petals in a rainy night is nothing extraordinary; and it is perfectly natural that one of them should fall on the hair of a dead body lying close under it. The other circumstances—the threads of tow, the broken twig, the bruised groundsel—certainly tend to support the conclusion of the *acte* as far as they go, but they are very slight circumstances, and if a single man had really thrown the body of a girl of fourteen from the top of a wall covered with plants and earthy matter, it would be natural to expect to find unequivocal marks of his having done so.

These indications, slight as they were, naturally and properly led the authorities to make further investigations in the monastery itself. [1] Accordingly Coumes, a brigadier of gendarmerie, went to examine the garden. Two monks went with him. He found footmarks leading before the orangery and near to the wall before which was the body. The marks were fresh. Some conversation took place between the monks and the brigadier on the subject, as to the nature of which there was a great conflict of evidence, to be noticed hereafter.

The post-mortem examination of the body showed that death had been caused by great violence to the head, which was bruised in various parts so seriously that the brain had received injuries which must have caused death almost immediately. [2] This appears from the extracts given in the *acte d'accusation* from the report of the medical experts. [3] The injuries to the head appear to have been inflicted by a broad blunt instrument, and might have been caused by knocking the head against the wall or against a pavement. There were marks on the person showing a violent attempt to ravish, which had not succeeded (the girl had not reached maturity). The underclothing was covered with fæcal matter, and from the contents of the stomach it appeared that death must have taken place one or two hours after the last meal.

[1] P. 120. [2] P. 40. [3] P. 115.

The fæces contained some grains of figs. On the folds of the underclothing was a stalk of fodder, a piece of barley-straw, other bits of straw, and a feather. The stalks of fodder appeared, on being examined, to be clover grass (*trèfle*).

These facts suggested the thought that the state of the linen of the monks might throw some light on the commission of the crime. There were about [1] 200 inmates altogether in the monastery, which was divided into two parts, the *pensionnat* and the *noviciat.* The linen of each establishment was used in common by the members of that establishment. The shirts of the *noviciat* were numbered; the shirts of the *pensionnat* were marked F + P (*frères du pensionnat*). The division, however, was not kept up strictly, some of the shirts properly belonging to each division being occasionally used in the other. The shirts were changed every Saturday. On making a search a shirt was found numbered 562, and consequently belonging to the *noviciat.* It was very dirty, having many spots of fæcal matter in different places, especially on the sleeves, on the outside of the back part and inside of the front. On the inside of the tail of the shirt were certain grains which the experts first took for the seed of clover-grass, but which, on more careful examination, they declared to be the grains of figs. A careful comparison was made between these grains and those which were found on the clothing of the dead body—the experts declared that they corresponded; and one of them, [2] M. Noulet (called for the first time at the second trial), declared the resemblance was so close between the two sets of fig-grains that, though he had made 200 different experiments on figs bought for the purpose, he had not found any such resemblance elsewhere. M. Fillol, a professor of chemistry, was less positive. Being asked whether he could say that the figs were of absolutely the same quality, he replied, to say so would be a mere conjecture. [3] M. Fillol examined all the other dirty shirts in the monastery (about 200), and found no fig-grains on them.

[4] It is asserted in the *acte d'accusation,* though no other evidence of the assertion appears in the report of the trial,

[1] So stated, Proc.-Gen. 327. [2] P. 299. [3] P. 117-119. [4] P. 67-8.

TRIALS.

that the judge of instruction separately and individually examined all the persons present in the monastery at the time as to the state of their linen, and particularly as to the shirt which they took off on the 17th April, two days after the murder, and that "each of the monks recalled with pre-"cision the particulars which he had remarked on his shirt, "but none of these resembled those which appeared on the "shirt seized." The inference from this was that the shirt was worn by the murderer. The points as to the dirt and the seeds of figs were no doubt important, and the alleged result of the examination of all the 200 monks as to their recollection of the particular spots on their dirty shirts would have been vitally important if it were trustworthy; but no one could pretend to form an opinion on the question whether or not it was proved by the method of exhaustion that the shirt in question was the shirt of the murderer, unless he had either heard their evidence, or read a full report of it. All that was proved was, that the judge of instruction was satisfied upon the subject. Any one who has seen the way in which professional zeal generates conviction of the guilt of a person accused will attach to this no importance at all.

Whether or not the shirt had been worn by the murderer was an irrelevant question, unless it was shown to have been worn by Léotade. The proof of this consisted entirely of his answers when under interrogation. [1] It does not appear from the report when he was arrested, nor when the shirt was seized; but according to the *acte d'accusation*, he said, before it was shown to him, that he had not changed his shirt on Sunday 18th, and that he had returned the clean shirt served out to him to the monk who managed the linen. His reason for keeping the dirty shirt was that he had on his arm a blister, and that the sleeve of the dirty shirt was wider, and so more commodious than the sleeve of the clean one. If this were false there would be a motive for the falsehood, as, if believed, it would have exempted Léotade from the necessity of owning one of the shirts. On the other hand, it was unlikely that he should tell a lie which exposed him to contradiction by the monk who managed the linen, who is

[1] P. 66.

said to have declared that he had no recollection of the fact mentioned by Léotade. The *acte d'accusation* adds, that Léotade "wishing to give colour to the explanation which he "had invented," asked, when in prison, and after he had seen the shirt seized, for shirts with wider sleeves than those supplied to him, and that the monk who managed the linen deposed that he had never made any such application before. All this is consistent with the notion of a timid man losing his presence of mind when in solitary confinement under pressure, and inventing false excuses in mere terror.

The only other circumstance directly connected with the commission of the crime was that the garden of the monastery contained several outhouses, in some of which were contained a considerable quantity of hay, straw, and other fodder of the same kind with the few straws found on the body. Léotade had access to these places, and it was suggested that he enticed the girl into one of them and there committed the crime. [1] No marks were found to show that this had been done, though the *acte d'accusation* observes: "these barns "appear predestined for a crime committed under the "conditions of that of April 15th."

[2] It was also mentioned as a matter of suspicion, that, after the murder was committed, the judge of instruction asked Léotade to show him where he slept. Léotade took him to a room behind one of the large dormitories. This room was so situated that the judge of instruction thought that he could not possibly have got out at night for the purpose of disposing of the body. The judge of instruction afterwards asked where he had slept on the night in question, and Léotade showed him at once a room on the first floor. From this room, which Léotade occupied alone, he might have got out and reached the garden by opening two doors which had the same lock. It is said in the *acte d'accusation* that a key found in his possession would open these doors. He had thus an opportunity of getting to the garden if he pleased. The change of bed was made on the 17th, two days after the murder; an inquiry was made into the reasons for it. Another monk, called Brother Luke, was moved into

[1] P. 63. [2] P. 64.

TRIALS. the room into which Léotade was moved on the 17th. [1] It would appear that the two had previously slept each in a room by himself, but the reason given for their being removed into the room behind the dormitory was that Brother Luke was frightened at the crime, and did not wish to sleep alone. It was, indeed, an irregularity to allow a monk to do so. Upon this the *acte d'accusation* remarks that it is difficult to see how a man of Brother Luke's age could be alarmed by such a crime as the one committed on Cecile Combettes, and it adds: "The futility of these reasons "suggests the existence of more serious ones, which the "director hides from justice. We must see in this (*il faut* "*y voir*) a measure of internal discipline, destined to isolate "from the other members of the community a brother stained "with a double crime." One objection to this is that the measure consisted in removing the person supposed to be a criminal from a room where he slept alone in an isolated situation, to a room where he slept with another person, close to the principal dormitory of the establishment. The suggestion was, therefore, not only very harsh, but absurd and contradictory.

This was the case against Léotade, as it was established by other evidence than his own statements on interrogation; the principal items added to it by that process consisted of differences between the accounts which he gave at different times of the way in which he had spent his time on the morning in question. The exact date of his apprehension does not appear, but it appears to have taken place sometime in April, and from that time till his trial in the following February he appears to have been constantly examined, cross-examined, and re-examined, and confronted with other witnesses, always in secret. [2] At the trial, after the *acte d'accusation* had been read, and the President had pointed out to him the manner in which it bore upon him, he was again cross-examined at great length, and the argument for the prosecution was that he must be guilty because his answers

[1] Cf. *Acte d'accusation*, p. 65; evidence of Irlide, p. 199; evidence of Luc, p. 244.
[2] P. 81-105.

Trials.

on different occasions were in some degree inconsistent, and because on one or two points he was contradicted by other witnesses. The chief inconsistencies in his answers related to the way in which he disposed of his time on the day in question. His final account of the matter was that he went to mass on getting up, and came out at eight or a quarter-past eight; after mass he went to the *pensionnat*, and thence to another part of the monastery. He stayed there from nine to half-past nine, and then breakfasted. After this he gave the pupils some things which they wanted, and he then finished a *lettre de conscience* to his superior at Paris. He gave the letter to the director of the establishment at about a quarter-past ten, and then went through various other occupations, which he enumerated at length. A great point made against the prisoner was that he did not mention his *lettre de conscience*, the writing of which took up half an hour, from a quarter to ten to a quarter-past ten, when he was first examined on the subject, and that in all his numerous examinations he mentioned it only once before his trial. [1] A commission was sent to Paris to examine the superior to whom the letter was addressed, and it appeared from his evidence, and also from that of the clerks at the diligence office, that a parcel was sent on the 15th April from Toulouse to the superior at Paris, that the superior received it in due course, and that it contained a letter from Léotade. To an ordinary understanding this would appear, as far as it went, to corroborate Léotade's account. The corroboration would, indeed, be of little importance, because it would prove nothing as to the time when the letter was written, which was the important point; but the President cross-examined the prisoner upon it with great severity, suggesting that notwithstanding the solitary confinement (*le secret*) in which he had been placed, he had contrived to learn this fact from the monks, and had altered his evidence accordingly. [2] It would seem, however, that the concert between them, if there was one, was not complete; for the director of the establishment, Brother Irlide, said that Léotade gave him his *letter de conscience* about nine, after which he sent him to the infirmary

[1] P. 243. [2] P. 207.

TRIALS.

to wait upon a boy who had the scarlet fever. It must be observed that Léotade was not contradicted on this matter. As far as the evidence went it confirmed his story. The argument for the prosecution would seem to have been that the statement must be false, because it was not made at once, and that, if false, the motive for the falsehood must have been to conceal the fact that the time was really passed in committing the murder.

Another point in his interrogatory related to his shirt. The President read over the interrogatory of the 15th May. The effect of it was that he had not changed his shirt on the Saturday; that he had given the clean shirt to the monk who managed the infirmary, and that he had pointed out to the doctor who examined him on the 18th that his shirt was dirty. [1] The *acte d'accusation* declares that on all these points he was contradicted, but there was only one contradiction. [2] The doctor said he had remarked that the shirt was not dirty, but he remembered nothing about the conversation; and the infirmary monk declared only that he did not remember receiving back the shirt.

[3] Another alleged contradiction extracted by the interrogatory was, that Léotade said on one occasion that a pair of drawers he had worn would be found in his breeches, when, in fact, he had them on. He explained this by saying that he was confused at the accusation.

[4] Léotade was also interrogated at great length as to whether he had been with Jubrien in the passage at the time mentioned by Conte. He positively denied it. When first he was questioned on the subject, he said he did not recollect having been there; but when Conte described their position, dress, &c., circumstantially, both Léotade and Jubrien declared that it was not so; and Léotade added that he had not been in the *noviciat* during the whole day.

[5] Lastly, on being asked whether he had told the brigadier of gendarmerie that he had made certain footmarks in the monastery garden, he said he had not. He was somewhat roughly cross-examined about this; but he was right, and

[1] P. 17. [2] P. 114. [3] P. 92.
[4] P. 97. [5] P. 101.

the President wrong. [1] The *acte d'accusation* charges such a conversation, not with the brigadier, but with one of the doctors, Estevenet, who said in his evidence: "On seeing "the footmarks Léotade said, Probably some of our monks, "with the gardener, have made the footprints." Léotade admitted that he might have said this, though on a different day from that mentioned at first by the witness, and the witness owned that he might be mistaken as to the day. This shows at once the harshness and inaccuracy both of the judge and of the *acte d'accusation*.

These were the principal points in the case against Léotade. There were several others, for some sort of issue was raised or inference suggested upon almost every word that he said, and upon every trifling discrepancy that could be detected between his answers in any of his numerous interrogatories. Assuming that Conte spoke the truth, and taking every item of the evidence to be proved in a manner most unfavourable to him, it appears to me that there was barely a case of suspicion against him. The fact that he saw the girl in the passage proves no more than a possibility that he might have committed the crime. The marks and the fig-seeds on the shirt are the strongest evidence in the case; but the proof that he wore the shirt is altogether unsatisfactory. The inconsistencies, in his accounts of the way in which his time was passed, are trifling in the extreme. The only wonder is that, when kept in solitary confinement for many months, and interrogated every day, he did not fall into many more. Two of his observations on this subject are very remarkable. On being closely pressed to give a reason why he did not mention his *lettre de conscience* earlier, he said, "It is because the "judge of instruction and the *Procureur-Général* treated me "as a man who could not be innocent—they brow-beat me "(*violentaient*), they tortured me; it was not till I came to this "prison that I found a judge and a father. You, M. le Presi-"dent—yes! you alone—have not tormented me. [2] The others "treated me as a poor wretch already condemned to death." [3] At the close of the proceedings, on being asked whether he wished to add anything to his defence, Léotade observed, "I

[1] P. 33. [2] P. 87. [3] P. 359.

TRIALS.

"declare that I have not lied before justice. There is nothing "but sincerity in my words. If there are some contradictions "in my deposition, it is owing to the solitary confinement (*le "secret*) which I have undergone. Ah! gentlemen, if you "knew what solitary confinement is! Yesterday I saw a "scene which pained me. I saw a man who was being "brought out of solitary confinement to hear the mass—it "was terrible!—he was as thin as a skeleton. How he must "have suffered!"

The President ridiculed the notion of these tortures, but his own conduct showed that they were both possible and probable. His interrogatory is full of rebukes and sneers which, to a man on trial for his life, are most indecent. [1] For instance, he asked Léotade if he ever saw workwomen at Conte's. "*Léotade.* Not as far as I remember. *President.* "Stay. You already employ an expression which indicates "reticence." So, again: "I pass to your interrogatory of the "3rd May, and there I find a series of contradictions and "reticences." [2] So, "Brother Irlide will be examined directly. "He will remember, he will admit, that you have had several "communications with the establishment, and especially "with him." (When Irlide was called he was never questioned on the subject.) "You would do better, perhaps, to "confess the truth." [3] Again, Léotade explained a mistake by saying that he was troubled at the accusation. The President said: "This time, at all events, your trouble is not referred to "the pretended violence of which you say you were the victim. "That is better."

As for the judge of instruction, his own account of his proceedings supersedes all criticism. [4] After a long examination, the President said: "I will now profit by your "presence here to ask you whether you do not think it "proper to tell us, in order to throw as much light as possible "on this debate, those facts which are not introduced into "*procès verbaux*, but which are not unimportant to judges?"

"*Judge of Instruction.* You mean the impressions which "have resulted from my unofficial" (*en dehors de mes fonctions*) "conversations with the accused? I often went to see the

[1] P. 81. [2] P. 89. [3] P. 92. [4] P. 266.

" accused, to persuade him to submit patiently to his long " detention, and also to try to inspire him, as is my duty, " with the thought of making sincere and complete con- " fessions. I generally found Brother Léotade kneeling in " prayer in his chamber, and appearing so much absorbed in " his meditations that he did not perceive my arrival, and " that I was obliged to speak first to get a word from him. " He got up, and then long conversations between us began. " I made every effort to make him see that, in a religious " point of view, the way to expiate his crime was to tell the " whole truth to justice. One day he said to me: 'Yes, I " understand; and accordingly, if I had been guilty, I should " have already thrown myself at your feet.' 'My God!' said " I, 'you must not exaggerate your crime; it is, no doubt, " 'enormous; but human justice takes everything into account. " 'Perhaps they will think that you acted in one of those " 'movements of accidental fortuitous passion when reason " 'yields and the will almost disappears. God, who appreciates " 'all, will inspire your judges, and they will measure equitably " 'the proportions of your crime.' He listened with great at- " tention, and looking at me fixedly, said: 'Admit for a " 'moment . . . but death.' 'Well,' said I, 'who knows that " 'the perpetrator of the first crime was the perpetrator of the " 'second? The girl may have thrown herself down. The " 'death may have been accidental.' He reflected, and then " said, 'No; I am not guilty.' However, if I must say all I " think, I thought, and I still think, Léotade was on the point " of making a confession."

" *President.* What sense did you attach to the words, 'but " 'death'?"

"'Oh, my God!' I thought he meant to say, 'if they " 'excuse the first crime, will not they be inexorable for the " 'second!'" Upon this says the report, " Léotade energeti- " cally protests against the sense put on his words."

To a mind accustomed to English notions of justice, these artful attempts to entice the prisoner into a confession, mixed, as they are, with suggestions which are palpably false—like that about the girl having caused her own death —are unworthy, not merely of an officer of justice, but of

TRIALS. any man who has honour enough to refuse the functions of the vilest prison-spy. It is viewed differently in France. [1] The advocate of the *partie civile* used this incident as follows, without reproof: "Will you appeal, Léotade, to your "demeanour—to your demeanour before Dr. Estevenet, who "remarked your trouble and your incoherent words, or "before the judge of instruction, when, pushed by remorse, "you were on the point of confessing? Well, I demand "that confession from you now. I adjure you in the name "of all that is most sacred; I adjure you in the name of "this family, in tears, for whom I speak; I adjure you in "the name of this wretched girl, on whom the tomb is "closed; I adjure you in the name of religion, of which you "are one of the representatives, speak, confess. . . . !"

"He is silent. He is the criminal. Human justice is "about to condemn him, as a prelude to the sentence of "Divine justice." What would he have said if Léotade had confessed?

Léotade was found guilty, with extenuating circumstances, and sentenced to the galleys for life; he died there after two or three years' confinement. It is obvious that, if guilty at all, he was guilty of one of the most cruel and treacherous crimes on record; and it is difficult not to believe that the extenuation was rather in the evidence than in the guilt.

I have attempted to extract the pith of this case from the long, intricate and yet imperfect report of it; but in order to do so I have passed over a vast mass of evidence by which the case was swollen to unmanageable and almost unintelligible proportions. It will, however, be necessary to give a general description of its character in order to show the practical result of doing without rules of evidence, and investigating to the bottom every collateral issue which has any relation, however remote, to the question to be tried.

The case affords numerous illustrations of this, which it would be tedious and useless to describe in detail. A few may be referred to for the sake of illustration. The *acte d'accusation* is divided into two main parts; one intended to show that the crime was committed in the monastery, and the

[1] P. 314.

other intended to show that it was committed by Léotade. The first point was dwelt upon much more fully than the second. The monks were of course anxious to free themselves from the charge that their establishment had been the scene of rape and murder, and tried to find evidence by which it might be shown that the crime was committed elsewhere. With this object they made inquiries amongst the other persons who had been in the corridor when Conte and his two servants arrived. [1] It appeared that some young men were at that very time in the parlour which opened out of the corridor; and shortly after the arrest of Léotade "a "deposition," says the *acte d'accusation*, "which tended to give "a different direction to the procedure had been announced "through the newspapers." It was said in effect that a lad of the name of Vidal, who was one of the party, had seen the girl going towards the door to go out. This was a mere newspaper paragraph. It did not even appear that the monks were in any way connected with it, but "the judge of in-"struction prepared to receive this deposition and to provide "means for checking it."

TRIALS.

Vidal and Rudel were accordingly examined, and it appeared from their account that they had been sent for by the director of the monastery, to see whether they could prove that the girl had left it. Both of them said at first that they had not seen the girl go out; but on a second visit to the monastery, and on being shown the place, Vidal "thought that "he could remember that he seemed to have seen the girl pass "behind him, though he could not say he had seen her go "out, as at the moment he had his back towards the street." [2] Rudel, three novices, Navarre, Laphien, and Janissien, and the porter, who were all with Vidal at the time, are said in the *acte d'accusation* to have said that they had not seen the girl. The *acte d'accusation* accordingly declares that "the "*Court* has not hesitated to declare that Vidal's deposition is "unworthy of credit." Instead of leaving it to the prisoner to call him if he thought fit, he was called by the prosecution for the purpose apparently of being contradicted. [3] His first observation on giving his evidence was: "When I was called

[1] P. 45-6. [2] P. 47. [3] P. 186.

TRIALS.

"before the judge of instruction I said that I thought I had "seen this young girl in the neighbourhood, but some days "afterwards I saw and was persuaded that that was impossible." This of course destroyed any value which his evidence might have had in favour of the prisoner, but this was far from satisfying the prosecution. They went at length into the question how he came to say that he thought he had seen the girl. He then said that the monks had succeeded in persuading him that he had really seen her, and that they held a sort of rehearsal in which the persons who had been present were put in the positions which they had occupied in the corridor, and discussed the evidence which they were to give. They afterwards went up stairs into another part of the convent, and there consulted on it further. Vidal declared that he allowed himself at these conferences to be persuaded into saying that he thought he had seen the girl go out, though he also stated that he said he *thought* he had seen her in the first instance, and before any persuasion at all.

This was represented on the part of the prosecution as organized perjury, and every effort was made to make Vidal's evidence go to that length. [1] For instance, the President said: "Did not they reason like this—did not they say, "'The girl must have passed at this instant, and you will "'say that you saw her slip out as the chaplain entered;' "and did not they add, 'that will agree perfectly with the "'deposition of Madeleine Sabatier, who will say that she "'met the girl near la Moulinade'?

"*Vidal.* No, sir; Madeleine Sabatier was not mentioned.

"*President.* Well, but as to the rest, did not they reason in "this way?

"*Vidal.* They asked me if I had seen the girl go out, and 'I said it seemed so to me.

"*President.* That is, to please them (*par complaisance*) you "said you would say that it seemed so?

"*Vidal.* No. I had already said that it did seem so to me."

The two directors, Irlide and Floride, were also examined upon this point. [2] They both admitted that they had talked

[1] P. 253. [2] P. 200—207.

over the matter with Vidal, but declared that Vidal positively asserted that he had seen the girl go out, and that they told him to tell the truth. [1] There was, however, a contradiction between Vidal and Floride as to the place where the conversation took place; Vidal said it was in a place called the *Procure.* Floride at first denied it, but another monk confirming Vidal, he admitted that it might have been so.

The other persons present in the corridor said that the chaplain came in while they were talking, and in this the chaplain to some extent confirmed them, and three of them swore that they saw something or some one pass by the door as the chaplain came in. [2] The porter said that after Conte came in, he let out the servant Marion, that he then went up with Conte to the director, that on coming down again he saw several monks in the passage, but he did not observe whether or not the girl was there, and that he afterwards opened the door for the chaplain. From the way in which his evidence was given it is difficult to state shortly its effect, but the general result of it was that he wished to show that the girl might have left the convent without his seeing her, whilst the President cross-examined him with great strictness and asperity, to show that he must have seen her if she had left it. Jubrien, whom Conte said he saw with Léotade, was examined at great length and with frequent rebukes. He asserted that he was not with Léotade at the time and place mentioned, but he appears to have replied to almost every other question on the subject, that he did not remember or could not tell. The report is considerably abridged, but it indicates that Jubrien's deposition ran into a sort of argument between himself, the prisoner, the President, and the *Procureur-Général,* of which it is difficult to form any distinct notion.

From the way in which the whole of this evidence was taken it was put before the jury in an inverted order, and a great part of it was utterly irrelevant. The question was whether Léotade had murdered the girl in the convent. If Vidal could prove that she left it, the case was at an end. His first answer showed that he could not prove that, and it also showed that he was either too weak or too false to be

[1] P. 206. [2] P. 156—160.

TRIALS. trusted at all, because it contradicted his previous deposition. To show that he had been tampered with was altogether unimportant even if it were true, for Léotade was in prison and could not tamper with him, and he could not be responsible for the indiscretion or even for the dishonesty of unwise partisans. There was, however, no evidence of any subornation except Vidal's own statement, and as the case for the prosecution was that he was weak and dishonest, his statement was worth nothing. It was contradictory to say that when it made against the prisoner it was valid, and when it made in his favour it was worthless. The other witnesses, no doubt, gave their evidence in an unsatisfactory way; and if they had been called by the prisoner to prove his innocence by establishing the fact that the girl had left the convent, the degree of credit to which they would have been entitled would have been very questionable; but to argue that their disingenuous way of affirming that the girl did leave the convent, amounted to proof that she did not leave it, was equivalent to affirming that if the partisans of an accused person are indiscreet or fraudulent, he must be guilty. The fair result of the whole controversy seems to be, that it was not proved on the one hand that the girl did leave the convent, and that it was not proved on the other that she could not have left it unnoticed, though it does not seem probable that she could.

The intricacy and clumsiness of the way in which the evidence was given is indescribable. Vidal was recalled seven times, and was constantly confronted with the other witnesses, when warm disputes and contradictions took place. Every sort of gossip was introduced into the evidence. For instance, a witness, Evrard, said that Vidal had told him that he had seen the girl talking to two monks. Vidal on being asked, said, he had not seen anything of the sort, nor had he said so. [1] Evrard maintained that he had. Vidal declared that Evrard had retracted his statement on another occasion. Evrard owned that he had retracted because one Lambert had threatened him, but declared that notwithstanding this, it was true, and that Vidal had told the same story to the

[1] P. 212.

Procureur du Roi at Lavaur. Hereupon the *Procureur du Roi* of Lavaur [1] was sent for. He said that Evrard had told him that Vidal had said that he had seen the girl speak to two monks, and one of them make a sign to her; that Evrard came back next day, and said that his evidence was all false; that he returned in the evening and said it was true, and the retractation false, and that Lambert had threatened him. Hereupon the Procureur sent for Lambert, who said Evrard was a liar. Lastly, upon being asked whether or not he thought Vidal had said what Evrard said he said, the Procureur answered, "I do not know what to "think," on which the President answered, "No more do I." This is a good instance of the labyrinths of contradictions and nonsense which have to be explored if every question is discussed which is in any way connected with the main point at issue.

I will mention one more illustration of the same thing. Conte, upon whose assertion that he had seen Léotade in the passage all this mass of evidence was founded, was himself suspected, and the prosecution at once "explored his "whole life with the greatest care." [2] They found out that seven years before he had seduced his wife's sister, and a bookseller named Alazar, [3] to whom she was engaged, was called to prove that he had broken off the engagement in consequence, and to produce a letter from her (she had been dead six years), excusing her conduct. Hereupon Conte wished to give his version of the affair, but the President at last interfered. "*Mon Dieu!*" he exclaimed. "*Où cela nous* "*menera-t-il?*" The question should have been asked long before.

The evidence of Madeleine Sabatier, already alluded to, was another instance of one of these incidents as the French call them. Early in the proceedings, and long before the trial, she declared that on a day in April—she could not say which day, but she thought the 8th or 9th (*i. e.* a week before the murder) —she had seen the deceased standing at a window in a house not far from the cemetery. "It might be questioned," says the *acte d'accusation*, "whether the day when Sabatier said

[1] P. 213. [2] P. 71. [3] P. 260.

TRIALS.

"she saw Cecile was the 15th," which is certainly true, as she said herself she thought it was the 9th; "but other facts, "still more peremptory, demonstrate the lie of the witness." There is a wonderful refinement of harshness in arguing that a witness must have been suborned to commit perjury, because something which she did not say might have been of use to the prisoner, and would have been a lie if she had said it. [1] The *acte* then proceeds to prove that Sabatier's story was altogether false, if it asserted that the girl had been seen at the place mentioned on the 15th, and in a particular dress, &c. Under these circumstances the natural course would have been to leave this woman and her story out of the case, or to allow the prisoner to call her if he thought proper; but it appears to have been considered that, if she were called for the purpose of being contradicted, the exposure of her falsehood would raise a presumption that she had been suborned by persons who were aware of Léotade's guilt. She was called accordingly, and repeated her deposition, which was then contradicted by six other witnesses, some of whom got into supplementary contradictions amongst themselves. Sabatier was committed on the spot for perjury.

Another large division of the evidence had reference to certain footmarks discovered by the brigadier of the gendarmerie in the monastery garden. A monk, called Laurien, the gardener, said he had made them; and the brigadier and he contradicted each other as to the circumstances of a conversation between them on the subject. As Léotade had nothing whatever to do with the conversation, and as no attempt was made to connect him with the footmarks (except to the extent already mentioned), this was altogether irrelevant. It might have some tendency to show that one of the monks wanted to make evidence in favour of his convent, but it had no tendency to show the prisoner's guilt. Laurien, however, was committed to prison for perjury, and strong remarks were made on him. It is impossible not to see that the arrest of two witnesses favourable to the prisoner on the ground of perjury, simply because their evidence was contradicted by other witnesses,

[1] P. 154-5.

must have prejudiced the case for the prisoner fearfully, and terrified every witness whose evidence was favourable to him. The effect of this was obvious in Vidal's case. Whenever he seemed disposed to say that he thought the girl had left the convent he was threatened with arrest, and when so threatened he immediately became confused and indistinct.

A single illustration will show the brutal ferocity with which witnesses are liable to be used if their evidence is unwelcome to the authorities. A man named Lassus, [1] having given evidence to prove an alibi for Léotade, the *Procureur-Général* made the following observation on him: "To com-"plete your edification, gentlemen of the jury, as to this "witness, we think we ought to read you a letter from his "father, which will enable you to judge of his morality. The "presence of this witness at the trial is the height of im-"morality: it proves that not merely have they abused "religion, but they have gone so far as to practise with vice. "To produce such evidence is the last degree of depravity "and baseness." This appears to have roused at last the counsel for the prisoner, who began: "If such anathemas as "these are kept for all the prisoner's witnesses——" The President, however, interrupting him, observed: "In con-"science, this witness deserves what he has got."

A third series of witnesses was produced to rebut the possible suggestion that Conte had committed the crime, by establishing an alibi on his part. There appears to have been no reason to suppose he did commit it, except the suspicion which crossed the mind of the authorities in the first instance.

Many other witnesses were called to give an account of all sorts of rumours, conjectures, and incidents, which appear to have no connection with the subject. For instance, [2] Bazergue, a trunk-maker, declared that, when he heard that the girl was missing in the convent, he told his informant that if Cecile had entered the monastery, she would not leave it alive. "I "had," he said, "a sort of presentiment; and I added that, "if she had remained, their interest alone would be enough

[1] P. 272. [2] P. 182.

TRIALS. "to prevent her from being allowed to leave it alive." "This," said the President, "may be called a rather prophetic "appreciation if the fact is true." [1] Muraive, a painter, said that on the 20th April a man bought some rose-coloured paint of him, burned his face with a lucifer match, and rubbed the paint on it, so as to disguise himself. "*J'ai mon idée*," said the witness, "he was a monk in disguise." [2] M. Guilbert, who had kept a journal for twenty-nine years of everything that occurred in Toulouse, produced it in court, and read an entry to the effect that the body of a young girl had been found, and that there were many rumours on the subject. [3] Another witness saw some cabbages trampled on in a garden.

A number of witnesses for the defence were called, of whom some proved an alibi on behalf of Léotade, and others on behalf of Jubrien. The evidence as to Léotade was that he was engaged elsewhere in the convent at the time when Conte said he saw him in the corridor. The evidence as to Jubrien was, that he went from the corridor to the stable to sell a horse to a man named Bouhours, who was accompanied by Saligner. [4] Bouhours declaring that he had seen Vidal and Rudel, who declared that they had not seen him, he was immediately arrested. This part of the evidence is given in such an unsatisfactory manner in the report that it is difficult to make much out of it. [5] It appears, however, that Jubrien himself never mentioned the sale of the horse, and that he had declared that he had never been in the stable at all.

I do not pretend to have stated the whole of the evidence in this case. It would be almost impossible, and altogether unimportant to do so; but this account of the trial is correct, as far as it goes, and is sufficiently complete to give some notion of the practical working of the French system of criminal procedure.

[1] P. 285. [2] P. 284. [3] P. 285. [4] P. 269. [5] P. 281.

[1] THE AFFAIR OF ST. CYR.

Trials.

In June, 1860, Jean Joanon, Antoine Dechamps, and Jean François Chretien, were tried at Lyons for the murder of Marie Desfarges; the murder and rape of her daughter-in-law, Jeanne Marie Gayet, and her granddaughter, Pierrette Gayet; and the robbery of the house in which the murders and rapes were committed. The wives of Dechamps and Chretien were tried at the same time for receiving the goods stolen from the house. The trial began on the 7th June, and on the 12th it was adjourned till the following session, which began on the 10th July. On the 15th July, it ended in the conviction of Joanon, Dechamps, and Chretien, all of whom were condemned to death, and executed in pursuance of their sentence. Chretien's wife was convicted of receiving, and sentenced to six years' "reclusion," and Dechamps's wife was acquitted. The circumstances were as follows:—

[2] Marie Desfarges, an old woman of seventy, lived with her daughter, Madame Gayet, aged thirty-eight and her granddaughter, Pierrette Gayet, aged thirteen years and three months, in a house belonging to Madame Gayet, at St. Cyr-au-Mont-d'Or, near Lyons. The family owned property worth upwards of 64,000 francs, besides jewellery and ready money. They lived alone, and had no domestic servant, employing labourers to cultivate their land. On the 15th October, 1859, their house was shut up all day. On the 16th, it was still shut, and Benet, a neighbour, being alarmed, looked in at the

[1] The authority quoted is a report of the trials published at Lyons in 1860, and apparently edited by M. Grand, an advocate. It is in two parts, separately paged, and referred to as I. and II.

[2] *Acte d'accusation*, I. 14.

TRIALS.

bedroom window. The beds were made, but the boxes were open, and the room in great disorder. On going down stairs the three women were found lying dead on the kitchen-floor. The grandmother had contused wounds on her head which had broken the skull, and one of which formed a hole through which a person could put his finger into the brain: besides this, her throat had been chopped, apparently with a hatchet. The mother was stabbed to the heart, and had a second stab on the right breast. She had also an injury which had parted the temporal artery in front of the right ear, and bruises on the arm. On her throat were marks of strangulation, such as might have been made by a knee. The daughter had a contused wound on her thumb, and a stab to the heart, which might have been produced by the same instrument as that which had been used against her mother. The bodies of the mother and daughter showed marks of rape. There were two wooden vessels near the bodies which contained bloody water, as if the murderers had washed their hands. The house had been plundered.

Of the three prisoners, Dechamps and Chretien were relations of the murdered women. Chretien's mother-in-law was the paternal aunt of Madame Gayet, and Chretien acted as her agent and trustee (*mandataire*). Dechamps is stated to have claimed an interest in the inheritance; it does not appear in what capacity. [1] Joanon was no relation to any of them, but he had been in the employment of Madame Gayet as a labourer, and had some years before made her an offer of marriage. Madame Bouchard, who made the offer for him, said that Madame Gayet refused, "saying that she did not "wish to unite herself with the family of Joanon, and that she "thought Joanon himself idle, drunken, and gluttonous." It appears, however, that Madame Bouchard did not consider the refusal final, as she told Joanon that the marriage might come about after all. [2] It also appeared that he continued in the service of Madame Gayet, as his advocate stated, for as much as two years. [3] The *acte d'accusation* says that, after the refusal, his mistresses sought an opportunity of discharging

[1] II. 54. [2] II. 120. [3] I. 17.

him; but this is not intelligible, for they might have done so at any moment without giving a reason.

A good deal of evidence was given to prove that, in consequence of Madame Gayet's refusal, Joanon had expressed ill-will towards her, that she and her daughter had expressed terror of him, and that his general character was bad. None of it, however, was very pointed. The principal evidence as to Joanon's expressions was, [1] that he said to a woman named Lhopital, "These women make a god of their money; but no "one knows what may happen to women living alone." This was seven months before the crime. [2] He told a man named Bernard, about eighteen months before the crime, that he had taken liberties with Madame Gayet, of whom he used a coarse expression, [3] but that she resisted him; [4] and he said something of the same sort to Madame Lauras. [5] He also said to Berthaud, "I made an offer of marriage to the widow Gayet, she "refused; but she shall repent it," using an oath. [6] A woman named Delorme came into Madame Gayet's house four years before the crime. She found her crying, and her cap in some disorder. She made a sign for her to stay when she was about to leave. All this comes to next to nothing. [7] The evidence that the Gayets went in fear of Joanon is thus described in the *acte d'accusation:* "The Gayets were under "no illusion as to the bad disposition of Joanon towards "them. Timid, and knowing that the man was capable of "everything, they *hardly dared to allow their most intimate "friends to have a glimpse of their suspicions.* Pierrette, being "less reserved, mentioned them to several persons." It was hard on the prisoner to make even the silence of the murdered women evidence against him by this ingenious suggestion.

There was little evidence that Madame Gayet ever complained of him. [8] One witness, Ducharme, said that, eight days before the crime, she told him of her vexations at Joanon's nocturnal visits and annoyances, and added, that he advised her to apply to the mayor or the police. [9] The President also said, in Joanon's interrogatory, that Madame Gayet had complained to the Mayor of the Commune of his

[1] I. 65. [2] I. 74. [3] II. 55. [4] I. 76. [5] I. 78.
[6] I. 78. [7] I. 17. [8] II. 59. [9] II. 36.

TRIALS.

annoying her. [1] The mayor himself, however, said that when she was at his office on other business she *was going to talk* about Joanon, but had said only *Il m'ennuie*, when the conversation was interrupted. The girl Pierrette had made some complaints. She told one witness that Joanon climbed over their walls and frightened them all, except her mother. It so happened that this witness was for once asked a question in the nature of cross-examination: [2] "Was it a serious "alarm, or merely something vague, that Pierrette expressed?" "Not precisely" (*i.e.* not precisely serious), "she said, only "that they feared to be assassinated some day, without re-"ferring these fears to Joanon. However, they were afraid "of him." This shows the real value of gossip of this sort. [3] Pierrette told another witness, Dupont, that they were afraid of being murdered. [4] A girl called Marie Vignat, who was intimate with Pierrette, said that Pierrette told her also that she was afraid of being assassinated. "The evening "before the crime, I said to her, Good-bye till to-morrow. "She answered, We cannot answer for to-morrow. You "sometimes come to see us in the evening, but you had "better come in the morning—at least, you would give the "alarm if we were murdered." She does not appear to have said that she feared Joanon would murder them; but she spoke strongly against him to Marie Vignat. [5] She said: "It "is said you are going to marry Joanon. You had better "jump into the Saone with a stone round your neck. He is "a man to be feared. My mother and I are afraid of him, "and we would not for all the world meet him in a road."

None of this evidence could have been given in an English court: but it would, perhaps, be going too far to say that it ought to have no weight at all. The fact that people are on bad terms may be proved quite as well, and generally better, by what each says of the other in his absence, than by what they say in each other's presence. It goes, however, a very little way towards showing the probability that a crime will be committed. It was clear that Pierrette Gayet disliked and feared Joanon; but it does

[1] I. 47. [2] I. 64. [3] I. 66.
[4] I. 68. [5] I. 68.

not follow that he had given her reasonable grounds for fear. If she disliked him, and knew that he wanted to marry her mother, her language would be natural enough. Her fears of assassination in general prove little more than timidity, not unnatural in a girl living alone with her mother and grandmother.

The consequence of these circumstances is thus described in the *acte d'accusation:* [1]"After the 16th October" (the date of the discovery of the bodies), "public opinion pro-"nounced violently against Joanon. He had fixed himself "at St. Cyr for some years. His house is hardly two hundred "paces from that of the Gayets. Though the eldest son of a "family in easy circumstances, Joanon seems to have been, "so to speak, repudiated by his relations. His maternal "grandfather, in excluding him from the inheritance by his "holograph will, dated February 21, 1857, inflicted on him a "sort of curse, in these words: 'I give and I leave to my "'grandson Joanny Joanon, the eldest boy, the sum of ten "'francs for the whole of his legacy, because he has behaved "'very ill.' [2]Signalized by the witnesses as a man without "morality, of a sombre, false, and wicked character, Joanon "lived in isolation." The principal witnesses to this effect were the mayor and the *juge de paix.* [3]The mayor said at the first hearing, Joanon "was feared, and little liked. . . ." "I never, however, heard that he was debauched." At the adjourned hearing, however, he spoke very differently. [4]"*Pr.* "Give us some information as to Joanon's morality? *A.* It "was very bad at St. Cyr. Twice I heard of follies (*niai-*"*series*) which ended before the *juge de paix.* He went with "idiot girls and women of bad character." The *juge de paix* gave him a very bad character. "He owed five francs "to the *garde champêtre,* and refused to pay them; he stole "luzern, either from avarice, or cupidity, or bad faith; "he contested a debt of fifty francs to his baker. I know "he was debauched, and reputed to be connected with "women of bad character." He also referred to the idiot girls. When Joanon was asked what he said to this, he

[1] II. 58. [2] I. 17. [3] I. 59. [4] II. 47.

TRIALS. replied, [1] "The *juge de paix* has listened to the scandal (*les* "*mauvaises langues*) of St. Cyr"—a sensible remark.

I have given this part of the evidence in detail, because it shows what sort of matter is excluded by the operation of our own rules of evidence.

On the 19th October Joanon was called as a witness, and examined as to where he had been at the time of the crime, "like many others." [2] He said first that he had come to his own house at 8.30 P.M., and that he had then gone to a baker's. He went next day to the baker, Pionchon, and asked him to say that he had bought his bread that evening, and had passed the evening with him. This was Pionchon's account at the trial, which differed to some extent from what he had said previously. Joanon said in explanation: "I told "him I had made a mistake before the judge of instruction, "but I did not mean to ask for false evidence." He had, in fact, been at Pionchon's the day before. At his next examination (October 20), he said he might be mistaken as to the baker, but that he had been at Vignat's, and had come home at 7.30. On the 21st, he said he had stayed at Vignat's till 7.30, and then gone home. Madame Vignat and her daughter both said he had left about 4. He added, that three persons, Mandaroux, Lauras, and Lenoir, must have seen him. [3] Mandaroux said he saw him about 5; [4] H. Lauras had heard a voice in his house at 7 or 7.15, [5] and two women, Noir and Dury, met him thirty or forty yards from the house of the Gayets at about 7.30. One of them, Dury, heard the clock strike as she passed the house of a neighbour. Joanon declared at the trial that it was 6.30 and not 7.30 when he met them. His advocate said that it appeared from the evidence of J. L. Lauras that the two women, Noir and Dury, left his house, at which they had been washing, at 5.45, and that it was 1,748 metres or less than one mile and a quarter from that house to the place where they met Joanon; whence [6] he argued that Joanon must have been right as to the time. The difficulty of fixing time accurately is notorious; nor did it in this case

[1] I. 95. [2] I. 77. [3] I. 75. [4] I. 76. [5] I. 77. [6] I. 122.

make much difference. The murder was probably committed between 6.30 and 7.30. Joanon's house was only 200 yards from the house of the Gayets. Hence, whether he returned home at 6.30 or 7.30, he was close by the spot at the time.

In his interrogatory at the trial, he said he had been at a piece of land belonging to him, had returned at nightfall, and not gone out again. Hereupon the President said: [1] "You gave a "number of versions during the instruction; you make new "ones to-day. *A.* They said so many things to me—they "bothered me so dreadfully (*ils m'ont si péniblement retourné*) "that I do not know what I said." . . . The general result seems to have been that, though he did not establish an alibi, he did not attempt to do so, for his conversation with Pionchon would account for part only of the evening; and that, on the one hand, he was close to the place where the crime was committed at the time, though, on the other hand, he naturally would be there, as it was his home. To me, the fact that he gave different accounts when he was re-examined five or six times over, seems to prove nothing at all. A weak or confused memory, that amount of severity in the magistrate which would provoke the exercise of petty and short-sighted cunning and falsehood, fright at being the object of suspicion, would account for such confusion as well as guilt: indeed, they would account for it better. A guilty man would hardly have mentioned the persons who saw him, and would, probably, have seen the necessity of inventing one story and sticking to it. This is a good instance of the perplexity which may be produced by putting too great a stress on a man's memory. It is more difficult to say what was the precise amount of discrepancy between Joanon's different statements, and what is the fair inference to be drawn from those discrepancies, under all the circumstances, than to form an opinion of his innocence or guilt apart from his statements on this subject. Evidence treated thus is like handwriting scratched out and altered so often as to become, at last, one unintelligible mass of blots and scratches. It shows that too much inquiry may produce darkness instead of light.

[1] I. 44.

TRIALS.

Notwithstanding the suspicion thus excited against Joanon, he was not arrested, and no further information on the subject of the crime was obtained for several months. At last, on the 14th February, four months after the murder, Joanon was drinking with the *garde champêtre* of St. Cyr at a cabaret. The garde asked him to pay five francs which he owed him. Joanon said, [1] "I will give you them, but I must first have an "apology." I answered, "Every one in the neighbourhood "accuses you." I pressed him, saying, "You ought at least to "have spared the girl." He answered, "I did my best, I "could not prevent it; but I will not sign."

It is in relation to evidence of this sort that cross-examination is most important. It is quite possible that, on proper cross-examination, a very different turn might have been given to this expression from the one attached to it by a man who was obviously fishing for a confession. The report (like most reports of French trials) is not full, and no cross-examination is given. Another witness, Bizayon, heard the same words, and reported them quite differently. "You would "like to make me talk, but I won't sign." Two others, Gerard and Clement, made it a little stronger. Gerard said it was "I tried to prevent the crime." Clement—"I tried to prevent "the crime of the Gayet family." Clement also complained that Joanon had tried to cheat him of fifty francs by a false receipt. [2] Gerard added, that Joanon was pressed with questions as to the part he had taken in the crime, and that he spoke on the faith of a declaration that the prosecution against him had been abandoned. [3] Joanon himself said that he said what he did to get rid of the *garde*, who was plaguing him with questions. However this may be, he was immediately arrested, and when before the mayor he observed that he had better have broken his leg than have said what he did. Joanon denied having said this, but it proved nothing against him. Whether he was innocent or guilty, the remark was perfectly true.

This was the whole of the evidence against Joanon, with the exception of the confessions of the other two prisoners, obtained under the following circumstances: On the 16th

[1] I. 61. [2] I. 79. [3] I. 62.

February, two days after Joanon's arrest, Chretien offered for sale, at Lyons, two old gold watches. The watchmaker found spots on them, which he thought were blood, and took them to the commissary of police. Upon examination it appeared that the spots were not blood, but that the watches had belonged to the Gayets. Hereupon Chretien was arrested. He said at first that he had stolen the watches, when the property was removed after the sale, having found them on the top of a piece of furniture. This, however, was contradicted by persons to whom he referred, and his house was searched. On the first search there were found 670*f.*, for the possession of which he accounted; but on a further search a purse was discovered, containing 1,380*f.* in gold, in a purse set with pearls, and various small articles, which were identified as the property of the Gayets. Chretien declared that he knew nothing of the money, and that it belonged to his wife.

TRIALS.

[1] She said that at her marriage she had 600*f.*, which she had concealed from her husband; that for twelve years past she had had a lover (who said he gave her about 120*f.* a year—a sum which the President described as enormous), and that she saved on the poultry. She said that as soon as she got a piece of gold she put it into this purse, and never took any out. She had been married twenty years. On examining the dates of the coins, it appeared that 220*f.* only were earlier than 1839, when she said she had 600*f.*, 200*f.* between 1839 and 1852, and 960*f.* between 1852 and 1859. [2] This ingenious argument silenced her. [3] Chretien had a difficulty in accounting for his time. He was seen coming home at eight, and he left his work at half-past five.

As Chretien was supposed to have committed the murder for the sake of the inheritance, Dechamps was arrested also as a party interested in the same way. [4] Some articles are said in the *acte d'accusation* to have been found in his house, and his father was seen digging in a field, for the purpose, as he afterwards said, of hiding a cock and some

[1] "Dans la situation pécuniare où vous êtes à raison de vos dettes cette "somme de 120*f.* était énorme."—I. 89.
[2] *Acte d'accusation*, I. 22, 23. [3] I. 90. [4] I. 24.

TRIALS.

copper articles given him by his son. He also was arrested, but, on the cock being found, was set at liberty, and immediately drowned himself. [1] Dechamps had the same sort of difficulty in proving an alibi as Chretien and Joanon, and his wife asked a neighbour to say she had seen her between five and eight. [2] On searching a well at Dechamps' house, a hatchet, such as is used for vine-dressing, was found. The handle was cut off, the end of the handle was charred, and the head had been in the fire; and Dechamps's wife tried to bribe the persons who made the search not to find it. This hatchet had belonged to the Gayets, and might have been used to make the wounds on the throat of the grandmother and granddaughter. It had been seen in the house after the murder hidden behind some faggots in the cellar, and had afterwards disappeared. It was, no doubt, the height of folly in Dechamps to meddle with it; but it was just the sort of folly which criminals often commit, and his wife's conduct left no doubt that it was purposely concealed in the well. This is a case in which the English rules would have excluded material evidence. Her statements in his absence would not have been admissible against him, but they were clearly important.

Chretien and Dechamps being both arrested, and taken to Lyons, Chretien, on the 3rd April, sent for the judge of instruction, and made a full confession to him. The substance of it was that the murder was planned by Joanon, out of revenge because Madame Gayet had refused him. That he suggested to Dechamps to take part in the crime, on the ground that by doing so he would inherit part of the property, and that Dechamps mentioned the matter to him (Chretien) about a fortnight before the crime. Joanon was to choose the day. On the 14th October, at about six, Dechamps fetched Chretien, and they went to a mulberry wood close by the house of the Gayets, where they found Joanon. They then got into the house, which was not locked up, and found the Gayets at supper. They received them kindly, and talked for a few minutes, when Joanon gave the signal by crying "*Allons,*" on which Chretien, who was armed with a

[1] I. 25. [2] I. 82.

flint-stone, knocked down the grandmother, and killed her with a single blow, Dechamps stabbed the girl with a knife, and Joanon attacked the mother. She got the hatchet, afterwards found in the well; but Dechamps pulled it from her, on which Joanon stabbed her. Joanon and Dechamps then committed the rapes. [1] It is not stated what account he gave of the wounds in the neck. TRIALS.

On being confronted with Dechamps and Joanon, Dechamps contradicted Chretien; as for Joanon a remarkable scene took place. [2] The *acte d'accusation* says: "As to "Joanon, to give an account" (*pour faire connaître*) "of his "attitude and strange words during this confrontation, it "would be necessary to transcribe verbatim the *procès-verbal* "of the judge of instruction." (If the jury were to form an opinion it would have been just as well to take this amount of trouble.) "After their first confrontation he pretends "that he has not seen Chretien, and demands to be again "brought into his presence. Chretien was brought before "him several times. Sometimes Joanon declared that he "did not know the man; that he was then speaking to him "for the first time; then he begs to be left alone with him "for an hour, that he would soon confess him and make "him change his language; sometimes he tries to seduce "him, by declaring that he will take care of his wife and "children, by talking of the wealth of his own family, by "saying that he attaches himself to him like a brother, and "that he wishes to render him every sort of service.

"Chretien does not allow himself to be shaken; he recalls "to his accomplice, one by one, all the circumstances of their "crime; then Joanon insults him, calls him a hypocrite and "a man possessed, and accuses him of dissembling his crime, "of hiding his true accomplices to save his friends, his re-"lations, and his son; then abruptly changing his tone, he "becomes again soft and coaxing; he tells Chretien that he "takes an interest in him, that he does not think him "malicious, and he begs him to be reasonable. He talks, "also, of the money of which he himself can dispose; of the "services he can render his wife and children, if on his part

[1] I. 27. [2] I. 28.

TRIALS.

" he will make the confessions he ought to make, whereas " if he causes his (Joanon's) death he will be able to do " nothing for him."

The way in which Joanon behaved on hearing Chretien's statement was, no doubt, important evidence either for or against him. According to English notions it would be the only part of the evidence which in strictness would be admissible against him. The degree in which the French system of procedure takes the case out of the hands of the jury, and commits it to the authorities, is well illustrated by the fact, that as far as this most important evidence was concerned they had in this instance to be guided entirely by the impression of the *Procureur-Général* who drew up the *acte d'accusation* as to the purport of the *procès-verbal* of the judge of instruction. It is as if an English jury were asked to act upon the impression made on the mind of the counsel for the Crown by reading the depositions.

At a later stage of the case, the *Procureur-Général* thought fit to read the *procès-verbal* in full. It is so characteristic and curious that I translate verbatim that part of it which describes the confrontation of Chretien and Joanon.

" *Judge of Instruction to Chretien.* Do you persist in " maintaining that you have no further revelations to make " to justice?

" *A.* No, sir, I have no more to say. I adhere to my con- " fessions, which are the expression of the truth.

" We, judge of instruction, caused the prisoner Joanon " to be brought from the house of detention to our office. " Chretien renewed his confessions in his presence, to which " Joanon answered only: 'What! Chretien, can you accuse " 'me of sharing in this crime?' To which Chretien an- " swered, with energy, 'YES, YES, Joanon, I accuse you " 'because you are guilty, and it is you who led us into " 'the crime.'

" The same day, at four o'clock, Joanon, having asked to " speak to us, we had him brought from the house of deten- " tion to our cabinet, when he said only, 'I am innocent; I " am innocent.'

" *Q.* Yet you have been in the presence of Chretien who

" recalled to you all the circumstances of the crime of which " you were the instigator? *A.* I certainly heard Chretien " accuse me, but I did not see him. I was troubled.

" *Q.* Your trouble cannot have prevented you from seeing " Chretien. He was only four paces from you in my office. " *A.* Still my trouble did prevent me from seeing him.

" *Q.* You saw him well enough to speak to him. *A.* I " own I spoke to him, but I did not see him.

" We, the judge of instruction, had Chretien brought into " our office again.

" *Q.* (to Joanon). You see Chretien now—Do you recog- " nise him?

" *A.* I have never seen that man.

" *Chretien* (of his own accord). Scoundrel (*canaille*). You " saw me well enough in the mulberry-garden, and I saw you " too, unluckily.—You did it all, and but for you I should " not be here.

" *Joanon.* I never spoke to you till to-day.

" *Chretien.* I have not seen you often, but I saw you " only too well, and spoke to you too much, the 14th October " last, in the mulberry garden, in the evening about seven " o'clock."

These answers are very important, and their effect is not given in the abstract contained in the *acte d'accusation.* They are an admission by Chretien that he was a stranger to the man, on a mere message from whom he was willing as he said to commit a horrible murder on his own relations.

" *Joanon.* Sir, you will search the criminals and you will " find them.

" *Q.* (to Chretien). In what place in the mulberry-garden " was Joanon? *A.* In front of the little window outside the " drain of the kitchen, by which you can see what goes on " in that room. Joanon told us that the two widows, Des- " farges and Gayet, were at supper, and pointed out to each " his victim.

" *Q.* What do you say to that Joanon? *A.* This man " wants to make his confession better and more complete; " put us together in the same cell for an hour and I answer " for it that he will say something else.

Trials.

"*Q.* Why do you want to see Chretien alone? *A.* Because "when I have confessed (*confessé*) Chretien, he won't accuse "me. That man does not know all the services that I can do "to him and his children; he does not know that my family "is rich, poor fellow; he does not know how I attach myself "to him like a brother; I will do him all sorts of services, "grant me what I ask to throw light on this affair.

"*Q.* (to Chretien). You hear what he says. *A.* I hear and "stand to my confession, because it is true. There were three "of us, Joanon, Dechamps, and I. Joanon said that we must "present ourselves to these women as if to ask shelter from "the storm" [there was a violent storm at the time], "and "that at the word '*Allons*' which he, Joanon, would give, "each should take his victim.

"*Joanon* (interrupting). I did not say so. (After a short "pause) I was at home.

"*Chretien* (in continuation). Joanon, addressing himself to "Dechamps said, 'You will kill Pierrette; Chretien, widow "'Desfarges; and I take charge of widow Gayet.'

"*Joanon* (interrupting). Allow me, sir, to take an hour "with him. I will make him retract. (To Chretien). My "lad, you think you are improving your position, but you are "mistaken. We can only die once. Reflect; this man wants "to save his son, who, no doubt, is his accomplice.

"*Chretien.* My son has been absent from St. Cyr for three "years, and on the 14th October was one hundred and sixty "leagues off. (This has been verified by the instruction and "is true.)

"*Joanon.* I hope Dechamps will make a better confession.

"*Q.* Then you know that Dechamps is guilty?" (The eagerness to catch at an admission is very characteristic.) "*A.* I said that Dechamps will confess if he is guilty.

"*Q.* (to Chretien). Continue your account of the events of "the evening of the 14th October? *A.* After receiving "Joanon's instructions we scaled together the boundary wall "which separates the court from the mulberry garden, and, "when we came to the kitchen door, Joanon entered first.

"*Joanon* (interrupting). You always put me first! *Chretien.* Dechamps entered second, and I third. As we entered

TRIALS.

" Joanon said that we came to ask shelter from the storm. " The women were at supper; they rose and offered us their " chairs. They received us well, poor women.

" *Joanon.* This is all a lie. I was at home.

" *Q.* (to Joanon). You have heard all these details, what " do you say to them? *A.* I take an interest in Chretien, he " is not a bad fellow, no more am I: he will be reasonable, " and I will take care of his wife and children if he makes " such confessions as he ought to make.

" *Chretien.* Scoundrel, my wife and children don't want " you for that.

" *Q.* If you are innocent, why does Chretien accuse you at " the expense of accusing himself? *A.* I don't know, per- " haps he hopes to screen a friend (*un des siens*); poor fellow, " he thinks he is freeing himself, but he is making his position " worse.

" *Q.* Chretien, go on with your story. *A.* After a few " moments, during which we talked about the storm, Joanon " got up, saying, '*Allons*'; at this signal we each threw " ourselves on our victims, as we had agreed in the mulberry " garden. I killed widow Desfarges with the stone, the poor " woman fell at my feet; Joanon and Dechamps, armed with " a knife, threw themselves on the widow Gayet and her " daughter Pierrette. The widow Gayet, trying to save her- " self from Joanon, took from the cupboard the hatchet which " you have shown me, to use it. Dechamps seeing this, came " to the assistance of Joanon and disarmed the widow Gayet." The women were then stabbed and ravished. " Dechamps " and Joanon washed their hands; they then went with me " into the next room, where I took from the wardrobe the two " watches which I afterwards came to Lyons to sell. Joanon " and Dechamps took the jewelry, which I believe they " afterwards shared at Joanon's house; as for me, I went " straight home, as I have already told you.

" *Q.* Well, Joanon, you have heard Chretien, what do you " say to these precise details? *A.* Chretien can say what he " likes; I am innocent. Oh, Mr. Judge, leave me alone an " hour with Chretien—I will clear it all up for you over a " bottle of wine; he knows that my family is rich; there is

TRIALS.

"no want of money; my relations must have left some for "me at the prison. Pray leave us alone an hour, I want to "enlighten justice." Then he said, "Let Chretien say how I "was dressed."

"*Chretien.* [1] I can't say, I took no notice."

This last question is very remarkable. It looks like a gleam of common sense and presence of mind in the midst of mad and abject terror; and, the instant that Chretien found himself upon a subject where he might be contradicted, his memory failed. Confrontation is in French procedure a substitute for our cross-examination. The one is as appropriate to the inquisitorial as the other to the litigious theory of criminal procedure. It is obvious that to a student who examines criminals in the spirit of a scientific inquirer, confrontation is likely to be most instructive, but for the purposes of attack and defence it is far less efficient than cross-examination.

At the trial Chretien was brought up first, the other prisoners being removed from the court after answering formal questions as to their age and residence. Chretien repeated, in answer to the President's questions, the story he had already told in prison. [2] He maintained, however, that the purse of 1,380*f.* was not part of the plunder. Joanon was then introduced, and taken through all the circumstances of the case. He contradicted nearly every assertion of every witness, constantly repeating that he was as innocent as a newborn child, at which the audience repeatedly laughed. [3] Judging merely from the report, it would seem that his behaviour throughout, though no doubt consistent with guilt, and to some extent suggestive of it, was also consistent with the bewilderment and terror of a weak-minded man who had utterly lost his presence of mind and self-command by a long imprisonment, repeated interrogations, and the pressure of odium and suspicion. He was treated with the harshness habitual to French judges. [4] For instance, in his second trial, he said, "I am the victim of two wretches. I swear before "God that I am innocent." The President replied, "Don't "add blasphemy" (*un outrage*) "to your abominable crimes."

[1] I. 110-2. [2] I. 39. [3] I. 42. [4] II. 38.

[1] Dechamps in the same way, though with more calmness and gravity, denied all that was laid to his charge. He could not explain the presence of the hatchet in his well, or of the property in his house. On the night between the fourth and fifth day's trial, Dechamps tried to hang himself in prison. The turnkey found him in bed with a cord round his neck. [2] The advocates then addressed the jury; after which Chretien was again examined. He then said that the whole of his previous statement was false. That he knew nothing of the murder, that he had made up his circumstantial account of it from what he saw and heard at St. Cyr. He was, however, unable to give any satisfactory, or even intelligible, account of his reasons for confessing, or of his acquaintance with the details of the offence. Upon this the *Procureur-Général* said that, as there was a mystery in the case, he wished for a "supplementary instruction" to clear it up, and requested the court to adjourn the case till the next session. This was accordingly done. TRIALS.

[3] During the adjournment, each of the prisoners underwent several interrogatories by the President of the *Cour d'Assises.* Chretien at once withdrew his retractation, and repeated the confession which he had originally made, saying that Dechamps had first mentioned the matter to him, that he mentioned it once only, and that he had never had any communication on the subject with Joanon on that, or as it would appear on any other, subject, either before or after the crime. Dechamps, on his second interrogatory, began to confess. He said that Joanon had suggested the crime to him months before it was executed, that he at the time took no notice of the suggestion; that Chretien mentioned it to him about a fortnight before the crime, and that on the evening when it was committed he came to him again and said that the time was come, and that he had made arrangements with Joanon. Dechamps at first refused, but, Chretien insisting, "in a moment of madness" he agreed to go. They found Joanon in the mulberry garden, entered the house, and committed the crime. [4] Dechamps murdered the grandmother

[1] I. 47. For the sake of brevity, I omit the case against the two women.
[2] I. 12. [3] II. 71. [4] II. 73.

TRIALS. with a flint-stone, Chretien the girl, and Joanon the mother. A disgusting controversy arose between Chretien and Dechamps on this subject, each wishing to throw upon the other the imputation of having murdered the girl and committed the rape. Dechamps had the advantage in it, as the state of his health rendered it unlikely that he should have been guilty of the most disgusting part of the offence. [1] In one of his interrogatories, Chretien admitted that this was so. Dechamps declared that Chretien took the money and Joanon the jewels, that he got nothing except 15*f.* 85*c.*, and that when he asked Chretien to divide the plunder with him the next day, Chretien refused, saying that he might sue him for it if he pleased. Chretien, on the other hand, declared that Joanon took the money. Each declared that the other cut the women's throats with the hatchet.

[2] Joanon declared on his interrogatory that he had nothing to do with the murder, but that he was passing on his way to his own house, and that he saw Chretien, Dechamps, and a man named Champion, go into the house together. He also said that he heard Champion make suspicious remarks to Dechamps afterwards.

At the trial, which took place on the 10th July, and the following days, the three prisoners substantially adhered to these statements, though in the course of the proceedings Joanon retracted the charges against Champion, whose innocence, it is said in the *acte d'accusation,* was established by a satisfactory alibi. Little was added to the case by the numerous witnesses who were examined. Most of them repeated the statements they had made before. The three prisoners were condemned to death, and executed in accordance with their sentence.

There can be no doubt as to the guilt of Chretien and Dechamps, though it must be admitted that under our system they would probably have escaped. The only evidence against them was the possession of part of the property, and the discovery of the hatchet in Dechamps's well. The property, however, might have been stolen after the murder, and, as the hatchet was seen at the house of

[1] II. 85. [2] II. 75.

the Gayets after the crime was committed, the fact that Dechamps stole and concealed it, even if proved, would have been no more than ground for suspicion. No stronger case in favour of interrogating a suspected person can be put than one in which he is proved to be in possession of the goods stolen from a murdered man. So far as they were concerned there can be no doubt that the result was creditable to French procedure; but with regard to Joanon it was very different. Not only was there nothing against him which an English judge would have left to a jury, but it is surely very doubtful whether he was guilty. To the assertions of such wretches as Chretien and Dechamps, no one who knows what a murderer is would pay the faintest attention. The passion for lying which great criminals display is a strange, though a distorted and inverted, testimony to the virtue of truth. It is difficult to assign any logical connection between lying and murder; but a murderer is always a liar. His very confession almost always contains lies, and he generally goes to the gallows with his mouth full of cant and hypocrisy.

Putting aside their evidence, there was really nothing against Joanon, except the expression which he incautiously used to the *garde champêtre,* and his statement about Champion. It would be dangerous to rely upon either of these pieces of evidence. The remark to the *garde champêtre* may have meant anything or nothing. The statement about Champion may have been, and probably was, a mere lie, invented under some foolish notion of saving himself. There are, moreover, considerable improbabilities in the stories of Chretien and Dechamps. [1] There was nothing to show that Joanon even knew Chretien, and as to Dechamps, the only connection between them stated in the *acte d'accusation* was that in the summer of 1859, some months before the crime, Joanon had threshed corn for him and his father. It was added, however, and this was described as "a fact of the highest importance, "throwing great light on the relations of the two prisoners," that Joanon carried on an adulterous intercourse with Dechamps's wife. It is remarkable that Dechamps and Chretien

[1] I. 25.

Trials.

contradicted each other in their confessions. Each said that the other suggested the crime to him as from Joanon. It seems barely credible that he should have sent a message either to or by a man whom he did not know, by or to a man almost equally unknown, on whose honour he had inflicted a deadly injury, to come to help him to commit a murder from which both of them were to receive advantage, whilst he was to receive none. The motives imputed to him were vengeance and lust. As to the first, he must have waited a long time for his vengeance, for the refusal to marry him had taken place some years before, and he had remained in the woman's service for some time afterwards. It seems, too, that he had got over his disappointment, such as it was. In his interrogatory on the adjourned trial, the President charged him with various acts of immorality, and then said, "You were "making offers to three young girls at once—Vignat, Benson, "and Tardy. *A.* There is no harm in making offers of "marriage." He admitted immoral conduct with other women. All this is opposed to the notion that he could have cared much for the widow Gayet's refusal, or have entertained that sort of passion for her which would be likely to produce the crime with which he was charged. Besides, if lust were his motive, it is hardly conceivable that he should beforehand associate others with him in the offence. There is an unnatural and hardly conceivable complication of wickedness and folly, which requires strong proof, in the notion of a man's inducing two others to help him in committing a triple murder, in order that he might have the opportunity of committing a rape.

It must also be remarked that there is no necessity for supposing that more than two persons were concerned in the crime. Two modes of murder only were employed, stabbing and striking with a stone, and the stabs might all have been inflicted with the same knife. Two of the women, indeed, were struck with the hatchet, but the hatchet belonged to the house, and both Chretien and Dechamps admitted that this was done after the rest of the crime. There were two rapes, and the presence of a man not sharing in such an infamy would, it might be supposed, have been some sort of restraint

to any one who had about him any traces of human nature. On the other hand, Dechamps was one of the criminals, and the state of his health made it improbable that he should commit that part of the crime, and this would, to some extent, point to the inference, that a third person was engaged.

TRIALS.

When the whole matter is impartially weighed, the inference seems to be that as against Dechamps and Chretien the case was proved conclusively, for the confession in each case was made circumstantially, with deliberation, and without any particular pressure. It was also persisted in, and was corroborated by the possession of the property of the persons murdered; to which it must be added, that the two men were friends and neighbours and connections, and that they had the same interest in the perpetration of the crime. As against Joanon, I think there was nothing more than suspicion, and not strong suspicion. Chretien knew that he was suspected, and was thus likely to mention his name in his confession. Dechamps heard the evidence at the first trial, and thus had an opportunity of making his confession agree with Chretien's. He also heard at that trial, possibly for the first time, of the relations between Joanon and his wife, and this would be a strong motive for his wishing to involve him in his destruction.

If it be asked what motive Chretien could have had in the first instance for adding to his other crimes that of murder by false testimony, the answer is supplied by the speech of his advocate, who pressed the jury to find him guilty with extenuating circumstances. After dwelling on the notion, that the lives of Joanon, Dechamps, and Dechamps' father, might be set off against those of the three murdered women; and on the fact that without Chretien's confession it would have been difficult, if not impossible, to convict the others, he said, "If you are without pity, take care lest some "day, under similar circumstances, after a similar crime, "after suspicions, arrests, and accusing circumstances—some "criminal, shaken at first, but confirmed by reflection in his "silence, may say—I confess?[1] I destroy myself deliberately?

[1] II. 103.

TRIALS.

"Remember Chretien, and what he got by it—No, no con-"fessions." The possibility that such arguments might be used in his favour, and that the jury might listen to them, is enough to account for any lie that a murderer might tell, if such a circumstance as his lying required to be accounted for at all.

[1] THE CASE OF FRANÇOIS LESNIER.

THE case of François Lesnier is remarkable as an illustration of the provisions of the French *Code d'Instruction Criminelle* as to inconsistent convictions. TRIALS.

In July, 1848, François Lesnier was convicted, with extenuating circumstances, at Bordeaux, of the murder of Claude Gay, and of arson on his house.

On the 16th March, 1855, Pierre Lespagne was convicted at Bordeaux of the same murder, and Daignaud and Mme Lespagne of having given false evidence against Lesnier.

These convictions being considered by the Court of Cassation to be contradictory, were both quashed, and a third trial was directed to take place at Toulouse to re-try each of the prisoners on the acts of accusation already found against them.

At the third trial, the act of accusation against Lesnier on the first trial formed part of the proceedings. It constitutes the only record of the evidence on which he was then convicted. Reports of the second and third trials were published at Bordeaux and Toulouse in 1855. In order to give a full account of the proceedings, which, taken as a whole, were extremely curious, I shall translate verbatim the act of accusation of 1848, and describe so much of the trials of 1855 as appears material.

ACT OF ACCUSATION.

The *Procureur-Général* of the Court of Appeal of Bordeaux states that the Chamber of Accusation of the Court of Appeal, on an information made before the tribunal of first instance

[1] See the "Affaire Lesnier," Bordeaux, 1855. It is in two parts, separately paged.

TRIALS. sitting at Libourne, by an order dated May 24, 1848, has sent Jean and François Lesnier, father and son, before the Court of Assize of the Department of the Gironde, there to be judged according to law.

In execution of the order above dated, in virtue of Article 241 of the Code of Criminal Procedure, the undersigned draws up this Act of Accusation, and declares that the following facts result from a new examination of the documents of procedure:—

Claude Gay, an old man of seventy, lived alone in an isolated house in the commune of Fieu, in a place called Petit-Massé. In the night between the 15th and 16th November last, a fire broke out in this house. Some inhabitants of the commune of Fieu, having perceived the flames, hurried to the scene of the accident. The door of the house and the outside shutter of the window of the single room of which the house consisted were open. The fire had already almost entirely destroyed a lean-to, or shed, built against the back of Gay's room.

Drouhau, junior, trying to enter the house, struck his foot against something, which turned out to be the corpse, still warm, of Pierre Claude Gay. It lay on the back, its feet turned towards the threshold, the arms hanging by the side of the body. A plate, containing food, was on the thighs, a spoon was near the right hand, and not far from this spoon was another empty plate.

The fire was soon confined and put out by pulling down the shed which was the seat of it.

The authorities arrived: the facts which they collected proved that Gay had been assassinated, and that, to conceal the traces of the assassination, the criminals had set fire to the house. It was also proved that three or four barrels of wine, which were in the burnt shed, had been previously carried off.

Marks which appeared to have been made by a bloody hand were observed on one of the wooden sides of the bed of Claude Gay. A pruning-knife found in Gay's house had a blood-stain on its extremity.

The head of the deceased rested on a cap (*serre tête*), also marked with blood.

The doctors—Emery and Soulé—were called to examine the body. They found a wound on the back and side of the head, made by a cutting and striking instrument, and were of opinion that death was caused by it. TRIALS.

Three or four barrels and a tub, which Gay's neighbours knew were in his possession, were not to be seen amongst the ruins of the shed. In the place where the barrels stood no remains of burnt casks were seen, and the ground was dry and firm.

A pine-wood almost touched the house of Gay. The witness Dubreuil, remarked that the broom was laid over a width of about a yard to a point outside the wood, where a pine broken at the root was laid in the same direction as the broom, and where a cart seemed to have been lifted. The marks of this cart could be traced towards the village of Fieu, the ground which borders the public road reaching to the track through the wood. Dubreuil perceived by the form of the foot-marks that the cart had been drawn by cows. These circumstances left no doubt that the barrels had been carried off.

Justice at first did not know who were the guilty persons. It afterwards discovered that the terror which they inspired had for some time put down public clamour. It was only in the month of December that Lesnier the father and Lesnier the son each domiciled in the commune of Fieu, and at last pointed out to the investigations of justice, were put under arrest.

On the 21st September, 1847, Lesnier, the son, had become the purchaser of the landed property of Claude Gay, for a life annuity of 6*f.* 75*c.* a month (5*s.* 7½*d.* a month, or 3*l.* 7*s.* 6*d.* a year).

He had not treated Claude Gay with as much care and attention as he ought. The old man complained bitterly of his proceedings to all the persons to whom he talked about his position. In the course of October, 1847, he said to Barbaron, "I thought I should be happy in my last days. Lesnier ought "to take care of me; but instead of trying to prolong my "life he would like to take it away. Ay! these people are "not men," he added, speaking of the father and son; "they "are tigers."

TRIALS.

Another day Gay said to the curé, "Lesnier, the son, lets "me want bread, and does not come to see me." Indeed, such was Gay's poverty, that to buy bread he sold M. Laboinière agricultural tools. On this occasion he said, "Young Lesnier is a rogue, a wretch; he would like to "know I was dead."

On the 9th and 14th October, Gay said to Pierre Lacoude that he had to do with thorough blackguards (*canaille à pot et à plat*), and that he should like to go to the hospital.

Young Lesnier had asked Barbaron to go and take down Gay's barrels, adding that Gay had given him half his wine on condition that he should pay the expense of the vintage. Barbaron repeated this to Gay, who answered, "I have "never given him my wine; you see he wants everything "for himself."

It is not out of place to observe, that on the 12th September, at Petit-Massé, young Lesnier came to Barbaron and asked him if he should know Gay's barrels again.

The complaints of Claude Gay were but too well justified by the murderous language of Lesnier against the unfortunate old man. A few days after the sale of the 21st September, he [" *on*," probably a misprint for "*il*"] said to Jacques Gautey, that when Gay died he would have a debauch. Jacques Gautey observed that Gay would, perhaps, survive him. [1] "No," he answered, "he is as good as dead; and be- "sides, M. Lamothe, the doctor, has assured me that he "will soon die."

He said also to Jacques Magère, "I bet twenty-five francs "that he has not six months to live;" and to Guillaume Drouhau, junior, "I bet he will be dead in three months."

Leonard Constant heard Lesnier say these words: "I am "going to send Gay to the hospital at Bordeaux; I must beg "one of my friends, a student, to give him a strong dose; in "fifteen days he will be no more. After his death I will "have a house built at Petit-Massé, and there I will keep "my school."

Afterwards, Jean Bernard, the cartwright, spoke to him of

[1] "Il est mort là où il est."

a plan of Gay's to go to the hospital. "He will not go," said young Lesnier; "I think before long you will have to make "him a coffin."

In the beginning of November Lesnier said to Mme. Lespagne, that Gay was ill, and that in eight days he would be no more.

Eight days afterwards Gay was assassinated. During the night of the 15th—16th, Jacques Gautey, the sexton, hearing a cry of fire, got up. He tried to wake young Lesnier, who it is said sleeps very lightly, and struck three hard blows at his door at different intervals. Lesnier got up before answering; but instead of running to the scene of the accident, he waited till several of his neighbours joined him. Jacques Gautey, as sexton, was going to ring the alarm-bell; Lesnier told him he had, perhaps, better wait till the mayor ordered him, adding, however, that he could do as he pleased. The curé of Fieu, coming up at the moment, told the sexton to go and ring the alarm-bell.

On the scene of the accident Lesnier took no part in the efforts made to put out the fire. He said to the persons who expressed surprise at his indifference, "What do you want of "me? I can do no more." He asked a witness if Gay was dead; and on his replying that he was, observed, "All the "better; God has been gracious to him." As he went back the village, Lesnier was in a state of high spirits, which struck every one who was with him. He played with two girls, Catherine Robin and Séconde Bireau, and made them laugh.

Marguerite Mothe heard him say, "I saw the first fire, but "hearing no one give the alarm I went to bed." He also said that he had executed the deed of the 29th September with Gay; that he was sure to be accused of having assassinated him. He begged the sexton to go and fetch his father. "I "want him," he said, "to guide me."

On the morning after the crime, Lesnier, the son, returned to Petit-Massé. Whilst the *juge de paix* was making investigations, Pierre Reynaud, who was standing by Lesnier, said, on perceiving blood on the chairs, "I think Gay was assas-"sinated. Look, there is blood!" "It is a trifle," said Lesnier.

TRIALS. "We are the only people who have seen it we must say "nothing." The same morning David Viardon, a gendarme, remarked footsteps in a field of Gay's; and seeing at the same moment the steps of Lesnier, he was struck with their identity with the first.

On the 16th, Lesnier, senior, came to the place of the accident with his servant, Jean Frappier, who pointed out a bit of rubbish from the fire. His master said, "Touch "nothing, and put your tongue in your pocket."

On the 15th, two witnesses, Guillaume Drouhau and Pierre Reynaud, remarked, at Petit-Massé, spots of blood on the breast of the shirt of Lesnier, senior. On the same day Lesnier went to Coutras. On his way he met Joseph Chenaut, a country agent, to whom he said, "A great mis-"fortune has happened. Gay is dead, and his house is burnt. "It seems he must have been into his shed to get wine, set "it on fire, and died of fright." As he said this, Joseph Chenaut saw spots of blood on his shirt at the place mentioned.

Jean Frappier declared at first before the judge of instruction that Lesnier, his master, had changed his shirt on his return from Petit-Massé, and before he went to Coutras; but he (Lesnier) had advised him to say so if he was questioned on the subject. Besides, Lesnier himself admitted that he had not changed his linen. We must add this important fact, that the three witnesses agree on the number of the marks of blood, on their place on the shirt, and on their extent.

After the burial of Gay, several persons met at young Lesnier's. Lesnier, the father, and Lesnier, the son, talked together in a low voice near the fire. Two witnesses heard the father say to the son, "The great misfortune is that all "was not burnt; the trial would be at an end. You did right "in putting the money into Gay's chest. You see, my boy, "that all has happened as I told you. I know as much "of it as these gentlemen." A moment after old Lesnier went out.

Young Lesnier came to Barbaron, and said, "A man has "gone to my father, and said this and that to him, and

"has invited him, on the strength of his investigations, to "summons so-and-so. My father has quieted him. I was "unwell yesterday; I am well to-day. Do you know this is "a matter which might get my head cut off?"

Lesnier, senior and junior, tried to misdirect the suspicions of justice by turning them upon an honourable man. They already began to point him out, as they have themselves admitted, by the obscure and lying remarks just mentioned.

After the crime, Lesnier, senior, asked Magère what he thought of the affair of Gay? He kept silent. "It must," said old Lesnier, "be either the Lesniers themselves or else "their enemies who have done the job." Lesnier, junior, at the same time spoke in the same way to Jacques Santez. "Our enemies," he said, "have assassinated Gay and have "burnt his house to compromise us."

Lesnier, junior, also said to Lamothe, "The rascals who "killed him knew that I had granted him an annuity: "thinking to destroy me they killed him: but I have just "come from Libourne, whither I was summoned. They are "on the track of the culprits. Ah, the rogues, they will be "found out!" On another occasion young Lesnier pointed out clearly the person whom he wished to submit to the action of the law. He told Guillaume Canbroche and Lagarde that, on the evening of Gay's murder, Lespagne had brought wine to St. Médard, and that it was supposed that this wine belonged to Gay. It is needless to observe that Lesnier, senior and junior, alone accused Lespagne, and that all those whose suspicions they tried to rouse vigorously repelled their imprudent accusations.

Lesnier expressed himself thus on the assassination of Gay, in the presence of Mme. Lespagne:—"Bah! if I had killed a "man, I should not care a curse. I belong to the Government [he was Government schoolmaster]. "I should be pardoned."

Another time Lesnier said to Michael Lafon that he could kill a man and be pardoned; that the Government to whom he belonged protected him.

After his arrest he said to the brigadier (Viardon), that in some days the barrels would be brought back empty to Gay's house.

TRIALS.

After Gay's assassination, Lesnier, senior and junior, appeared preoccupied and troubled before several witnesses.

The evidence which we have described was assuredly very weighty. However, a witness of capital importance, Mme. Lespagne, with whom young Lesnier publicly held criminal relations, had not at first revealed all that she had learnt. Pressed by the mayor of the commune of Fieu, and by several persons to tell the truth without reserve, she presented herself twice before the judge of instruction, and declared the following facts.

Terror had prevented her from speaking. She was not ignorant that the Lesniers were in prison, but she feared their return. One day, profiting by the absence of her husband, young Lesnier forced her to comply with his criminal wishes. Afterwards he ordered her to poison her husband in these terms:—"You must go to an apothecary, you must buy "arsenic, and, to avoid your husband's suspicions, you must "first eat your own soup, and then put his into your dish, in "which you will have put the poison."

Some time after he compelled her to leave her husband's house. He wished to force her to sue for a judicial separation, and to make to him (Lesnier) a donation of all she possessed.

One day he was talking with Mme. Lespagne of what he intended to do for her. She said, "You are much embar-"rassed; you have many people to support; you will have "a bad bargain of Gay's land." "Ah, the rogue!" said Lesnier, "he won't embarrass me long."

In the beginning of November Mme. Lespagne was thinking of the misery which threatened her. Lesnier, junior, to reassure her, said. "I will have Gay's house rebuilt, and you "shall go and live with my father and mother." "What will "you do with Gay?" answered Mme. Lespagne, "Gay, he "won't be alive in eight days. I'll teach him to do without "bread. I'll make him turn his eyes as he never turned "them yet."

There was a report that Gay was selling his furniture. Mme. Lespagne told Lesnier of it, who said, "Gay is an old "rogue! It appears that he won't go to the hospital. He

"will see what will happen to him." "Well, what will you "do with him?" said Mme. Lespagne. "I will kill him," said Lesnier in a low voice.

He said another time to this woman, "Gay is an old good-"for-nothing rascal. My father told me that if he could not "get him out one way he would another."

Mme. Lespagne said, "What do you want to do with the "old man?'" "He is not strong," said Lesnier; "a good blow "with a hammer will soon lay him on the ground." "The "man, then, is very much in your way?" said Mme. Lespagne. "He will see—he will see," said Lesnier, shaking his head.

Mme. Lespagne had sold bread to Gay to the value of 43*f.*, which he owed her. Gay agreed, on the 16th of November, to give her his wine in payment. Mme. Lespagne mentioned this to Lesnier, junior, who said to her, "Don't count on the "wine to pay yourself; it won't stay long where it is. You "can scratch that debt out of your book; you will never have "anything." He added, as if to console Mme. Lespagne, "I "will make up half a barrel for you."

In fact, on the 14th November, at four in the afternoon, Mme. Lespagne was in front of her father's house. Lesnier, junior came along the road, and she asked him where he was going. "I am going to Grave-d'Or to settle with my father "about carrying off Gay's wine." She asked what teamster would carry the wine. "I do not want a teamster. Has not "my father a cart and cows?" She observed that it would be difficult for him to drive the cart near to Gay's house. He added that he and his father would roll the barrels through Chatard's pine-wood, and pointed out to her the road which he would follow with the cart. Young Lesnier had already told the same witness several times that his father and he were to carry the wine to Grave-d'Or.

Next day, towards seven in the evening, Mme. Lespagne again saw young Lesnier on the footpath which goes to Petit-Massé. Mme. Lespagne was in front of her father's house, which is by the side of the path. In passing by her Lesnier said, "I am very tired! I am waiting for my father, "and he does not come." He then went towards Gay's house.

On the morning of the 16th, at six or seven, this witness

TRIALS. went to get water at M. Chatard's well. She had to pass before the house of Lesnier, junior; she saw him on the threshold. His arms were crossed and his face was pale and sad. He had sabots on his feet, and they were spotted with blood. In the course of the day Mme. Lespagne went to Petit-Massé. Lesnier was there; he wore the same sabots, but she no longer saw the marks which she had observed some hours before,

The same day, Lesnier, junior, told Mme. Lespagne that he had been the first to see the fire, but that, hearing no noise, he had called no one, had gone into his own house and gone to bed.

The same day, again, Mme. Lespagne asked young Lesnier why neither he nor his father had approached the corpse. "We had no need," said he, "to approach it; we had knocked "it about quite enough."

Three days after the crime, young Lesnier met Mme. Lespagne near her own house. He seemed anxious. She asked him what was the matter. He said, "I have passed "two bad nights, but the last has been better, I was afraid "they should look for Gay's wine; but I think now the "search is given up, and I am less anxious."

She remarked that the inquiry was not over. "That be "damned," said he. "Let them do what they like. I don't "answer for Gay. Besides, they will find no evidence." The day he came to this woman, who had seen him in a ditch near the church of Fieu, he asked her if she was summoned. "Before you give your evidence I want to speak to you. I "cannot speak to you here, for we are seen." (In fact, Pellerin, a mason, was at work on the roof of the curé's house.) "No one "must hear what I have to say." Having a fowl of his son's, old Lesnier said, "Take that fowl and bring it to my house."

Eight or ten days before his arrest, young Lesnier came to Mme. Lespagne, and giving her a piece of soft cotton-stuff, said, "You will be summoned; and take care not to mention "my name, and speak much of your husband."

Lastly, on another occasion young Lesnier expressed in these terms the hope he had to escape the danger of his trial:—"I am now comfortable; I shall get out of it." After

some other remarks, Lesnier was, for a moment, silent; then he continued: "Don't repeat my confidences. You would "repent of it; you don't know what would happen."

Such, shortly, are the most important points in the crushing evidence of Mme. Lespagne.

Old and young Lesnier denied all the charges made against them. They pretended, before the authorities, that the assassination of Gay and the burning of his house had been committed by enemies who had resolved to destroy them; that the witnesses who deposed against them were bought, or gave their evidence from malice.

Young Lesnier went so far as to deny his relations with Mme. Lespagne, in the face of public notoriety. The two prisoners are surrounded by a reputation of malice, which makes them feared in the district where they live. This reputation is justified by the murderous remarks which they have made of the curé of the commune of Fieu, of Drouhau and Lespagne, a landowner—remarks attested by trustworthy witnesses. Daignaud was stopped at night on a public road by two persons. He fully recognised young Lesnier; he only thought he recognised his father.

After the arrest of the two prisoners, the wife of old Lesnier announced that she received letters from her son and her husband every day; that both were going to return; that they knew the witnesses who were examined against them; and that on their return those witnesses would repent of it.

This terror which old and young Lesnier tried to inspire had obviously no other object than to prevent the manifestation of a truth which must be fatal to them.

In consequence, Lesnier the elder and the younger are accused—

1. Of having, together and in concert, fraudulently carried off from the place called Petit-Massé, in the commune of Fieu, on the 15th November, 1847, a certain quantity of wine, to the prejudice of Claude Gay.

2. Of having, during the night between the 15th and 16th November wilfully set fire to the house inhabited by and belonging to the said Claude Gay.

TRIALS.

3. Of having, under the same circumstances and at the same place, wilfully put to death the said Claude Gay.

Of having committed this *meurtre* with premeditation—the homicide having preceded, accompanied, or followed the crimes of theft and arson qualified as above.

On which the jury will have to decide whether the prisoners are guilty.

Done at the bar (*parquet*) of the Court of Appeal, the 4th June, 1848.

The Procureur-Général,
(Signed) TROPLONG.

I have translated this document in full, both because it is the only report of the trial of 1848, and in order to give a complete specimen of an act of accusation.

The evidence which it states is of the weakest description possible; for, with exceptions too trifling to mention, it consists entirely of reports of conversations, of which all the important ones rested upon the evidence of single witnesses. Not a single fact was proved in the case which it is possible to represent upon any theory as having formed part either of the preparation for or execution of the crime, or as conduct caused by it and connected with it. The whole case rested, in fact, on the evidence of Mme. Lespagne, who was a woman of notoriously bad character, and who never opened her mouth on the subject till Lesnier was in prison. Daignaud's evidence as to the robbery by the two Lesniers—which, according to English law, would have been irrelevant and inadmissible—is introduced at the end of the act of accusation as a sort of make-weight. The acts says nothing of the occasion on which either it or the evidence of Mme. Lespagne was given. The vital importance of these circumstances, and the iniquity of suppressing all mention of them, appears from the subsequent proceedings.

Lesnier the father was acquitted; Lesnier the son was convicted, with extenuating circumstances—which are to be found in abundance in the evidence, but nowhere else—and sentenced to the galleys for life. His father, dissatisfied with the conviction, made every effort to obtain new information

on the subject, and, in the summer of 1854, he succeeded in doing so. The result of his inquiries was, that Lespagne was accused of the murder and arson, Mme. Lespagne and Daignaud of perjury, in relation to the Lesniers. Lespagne was also accused of subornation of perjury. The trial lasted for a long time, and a great mass of evidence was produced, which it is not worth while to state. The chief points in the evidence are enumerated in the act of accusation, which adds to the statements made in the act of accusation against Lesnier several facts of the utmost importance, and which must have been known to the authorities at the time of the first trial, but which they did not think fit to put forward. TRIALS.

The most important of these points related to the manner in which Mme. Lespagne made her revelations. Her first statement was made on the 20th December, 1847, the next on the 4th January, 1848, the next on the 1st February, the next on tho 10th. She had been examined before, and had then said nothing important. On each occasion she brought out a little more than the time before, and reserved for the last the strongest of her statements—that Lesnier had said that he and his father had no occasion to approach the body because they had "knocked it about enough already." It also was stated that, before the trial of Lesnier, Mme. Lespagne was reconciled to her husband. "She had been driven "by her husband from his home," says the act. "She returned "after the arrest of young Lesnier. Then began the series "of her lying declarations against the Lesniers. [1] This coin-"cidence alone is worth a whole demonstration." This remark is perfectly just, but it might and ought to have been made seven years before. If, instead of being in solitary confinement undergoing interrogatories, Lesnier had had an attorney to prepare his defence, and counsel to cross-examine the witnesses on the other side, the infamy of the woman would have been clearly proved. As soon as the least inquiry was made, it appeared that her story about Lesnier's seducing her by violence was ridiculously false. Various eye-witnesses deposed to acts of the greatest indecency and provocation on her part toward him. She admitted, as soon as she was strictly

[1] I. 40.

TRIALS. examined on the subject, that all she had said was false; she said that she had been suborned to say what she said by the curé of the parish, who was charged by Lesnier with courting his sister, and who made up what she was to say, and taught it her like a lesson, and threatened to refuse her the sacrament if she did not do as he wished. She also said that her husband had confessed his guilt to her. Daignaud admitted that his story about being robbed by the Lesniers was altogether false; and he added that his reason for telling it was that he owed Lespagne fifteen francs, and that Lespagne forgave him the debt, in consideration of his evidence.

These retractations appear to have been obtained by collecting a variety of remarks, made partly by Mme. Lespagne, and partly by other persons, implying that Lesnier was innocent and Lespagne guilty. A young man in particular, of the name of Malefille, who lived with Lespagne at the time of the murder, and died before the second trial, was said to have said that Lespagne and his brother-in-law, Beaumaine, had committed the crime, that Lespagne was to take Gay's wine for a debt of 45*f.*, that there was a dispute about one of the barrels that Gay resisted its removal, and that Lespagne thereupon struck him a fatal blow on the head with a hammer—an account consistent with the position of the wounds and other circumstances. Lespagne was seen, with his brother-in-law and another man, taking wine along the road on the day after the murder; and evidence was given of a considerable number of broken hints, and more or less suspicious remarks, by his wife and himself. With regard to Daignaud's evidence, several witnesses proved an alibi on behalf of each of the Lesniers.

Lespagne was arrested and charged with the murder. The case against him rested on the evidence of his wife and Daignaud. His wife was an adulteress, a perjured woman, and had attempted to commit murder by perjury. Daignaud, according to his own account, had agreed to swear away another man's life for 15*f.* The evidence in itself was utterly worthless. The way in which the prisoner was dealt with gives an instructive illustration of the practical working of the French criminal procedure. He was arrested, and

after a time brought to confess. On his trial he retracted his confession, declaring that it had been obtained from him by violence. This was treated as an impossibility, but the account given by the witnesses is as follows: "On the "fourth day," said Mr. Nadal, [1] Commissary of Police, "Les-"pagne was interrogated. The *Procureur-Impérial* informed "him of the numerous charges against him. He vigorously "denied for more than an hour that he was guilty. At last, "disconcerted by the evidence collected against him, he "asked me to go and find his relations, as he would tell all "before them. I went to his house for the purpose, but I "had hardly gone fifty paces before the brigadier of gen-"darmerie ran after me and said it was no use, as he had "confessed everything." After some further evidence, the *Procureur-Général* asked: "Is it true that the *Procureur-"Impérial* threatened Lespagne with the scaffold?—*A.* Alto-"gether untrue. On the contrary, they always tried to coax "him (*prendre par le douceur*). The [2] *Procureur-Impérial* "confined himself to begging Lespagne to tell the truth, and "confess all if he was guilty; *he made him understand that "if he kept silence he exposed himself to having his conduct "judged more severely.*" Another gendarme, Bernadou, was asked, "The accused says, that he made these confessions "because he was frightened?—[3]*A.* No one threatened him; "*on the contrary, they spoke of his family, and told him, that "the only way to obtain some indulgence was to tell the whole "truth.*" The degree of pressure, which is considered legitimate under this system, is curiously exemplified by these answers, and by the fact, that when Lespagne retracted his confessions, his advocate, the *juge de paix*, his brother-in-law, and the President, all in open court begged Lespagne to confess. He refused to do so, but was convicted, and sentenced to twenty years of the galleys.

Trials.

The result of this conviction was that a third trial took place, which was a repetition of the second. During the interval fresh efforts were made to obtain a confession from Lespagne. They are thus described by the *juge de paix* who made them:—[4] "As *juge de paix*, and on account of

[1] I. 78. [2] I. 80. [3] I. 124. [2] II. 33.

TRIALS.

"the influence which I thought I ought to exert over the "accused, when I saw that he constantly retracted, during "the hearings of the 12th, 13th, and 14th, the confessions "which he had made at the time of his arrest, I thought it "my duty to visit him in prison, to get him to tell the truth. "M. Princeteau, his advocate, who had preceded me, had in "vain tried to bring him to do so. I found him immovable "myself. Soon after, I told his relations to try new efforts "for this purpose, and I went with them and M. Princeteau "again to the prison. Being then pressed very closely, "he at last said, 'Well, yes, you will have it; I shall lose "my head; I am forced to own that I was the involuntary "cause of his death. I pushed him, he fell backwards, and "his head must have struck upon some farming tool or other, "which made his wound."

The degree of terror and prejudice which is produced by the zeal of gendarmes and the other local agents of the central power—that is, by the practical working of the inquisitorial theory of criminal law—is well shown by the fact, that all the witnesses who proved the perjury of Daignaud, on being asked why they had not come forward at the first trial, answered, that they were afraid because the guilt of Lesnier was the established theory. [1] One man, who proved an alibi on behalf of old Lesnier, as to the robbery on Daignaud, was asked, "Why did not you speak "of this in 1848?—*A.* I was afraid, because I thought I "should be alone." Another [2] said, "I was afraid because I "was alone, and every one said that Lesnier was guilty." The practical application of the system is described with great point and vigour by the *Procureur-Général*, in his summing up to the jury. His language supplies a better vindication of the practical sagacity of many of the rules and principles of English criminal procedure than the most elaborate arguments on the subject. After describing the way in which Lespagne was connected with the mayor, the curé, and the other important personages of the commune he says, "You understand now, gentlemen of the jury, what passed "in 1847. Justice pursued its usual routine (*ses errements*

[1] I. 90. [2] I. 88.

" *ordinaires*). It did what it inevitably must do when it " informs itself of a crime. As it has not the gift of " divination, it took its first instructions from the local " authorities, influenced by their impressions, and circum- " vented and abused by them, it has unhappily allowed " itself to be drawn into their ways of thinking. To its eyes " as for theirs the evidence against Lesnier came to light, " the guilt of Lespagne remained in the shade.

" In this state of affairs, and in this state of feeling, there " suddenly appeared two crushing depositions against Lesnier. " received with a sort of acclamation by the factitious opinion " of the country, and, combined with detestable skill, they " easily surprised the confidence of the judge."

On his second trial, Lespagne was sentenced to the galleys for life. He made other confessions, which appear more trustworthy than those already mentioned, but, on the whole, his guilt was not much more satisfactorily proved than that of Lesnier. It would be tedious to enter minutely into the evidence in this case. Its value lies in the illustration which it affords of the spirit of the inquisitorial system of procedure.

CASES AND STATUTES CITED

AND

GENERAL INDEX.

CASES CITED.

STATUTES CITED.

INDEX.

D.

E.

F.

H.

P P 2

P.

T.

U

THE END.

30

LONDON : R. CLAY, SONS, AND TAYLOR, PRINTERS, BREAD STREET HILL, E.C.